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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION OF NATIONAL ADVERTISERS, INC.; GROCERY MANUFACTURERS OF AMERICA, INC.; SOAP AND DETERGENT ASSOCIATION; NATIONAL FOOD PROCESSORS ASSOCIATION; THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; THE AMERICAN PAPER AND FOREST ASSOCIATION; THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE CALIFORNIA CHAMBER OF COMMERCE; and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs-Appellants,

CALIFORNIANS AGAINST WASTE and THE ENVIRONMENTAL DEFENSE FUND,

Intervenors-Appellees,

v.

DANIEL E. LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant-Appellee.

No. 93-15644

D.C. No. CV-92-00660-MHP

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
September 13, 1994—San Francisco, California

Filed November 18, 1994

Before: Herbert Y.C. Choy, John T. Noonan, Jr., Circuit Judges and Alfredo C. Marquez, District Judge.*

Opinion by Judge Choy;
Dissent by Judge Noonan

SUMMARY

Business Law/Consumers/Advertising

The court of appeals affirmed a district court judgment. The court held that a California statute that regulates environmental claims that can be made by manufacturers and distributors of consumer goods, is not an unconstitutional restriction on speech.

California Business and Professions Code § 17508.5 makes it unlawful for a manufacturer or distributor of consumer goods to represent that its products are "ozone friendly," "biodegradable," "photodegradable," "recyclable" or "recycled," unless their goods meet the statute's definitions of those terms. Appellants, the Association of National Advertisers, Inc. and other plaintiffs (collectively, Trade Associations) responded to the passage of § 17508.5 by bringing suit in the district court against appellee the Attorney General of California. The Trade Associations sought a declaration that § 17508.5 impermissibly restricts both commercial and non-commercial speech and is unconstitutionally vague. They

*The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

also pursued a permanent injunction against the statute's enforcement. Appellees, the Californians Against Waste and the Environmental Defense Fund (collectively, CAW) intervened.

The district court held that the statute was adequately tailored to further substantial state interests in consumer and environmental protection and, accordingly, complied with the First Amendment. The Trade Associations appealed, contending that the district court erred in concluding that § 17508.5 regulates only commercial speech. The Trade Associations also contended that the district court erroneously analyzed the statute under an intermediate standard of scrutiny inapplicable to non-commercial speech, or to commercial speech inextricably intertwined with more privileged expression. The Trade Associations also contended that the district court misapplied intermediate scrutiny by ignoring far less restrictive alternatives to § 17508.5 and mistakenly finding that the statute directly advances a substantial governmental interest.

[1] The district court correctly found that the messages § 17508.5 regulates possess the characteristics the Supreme Court recognizes as constituting commercial speech. [2] Accordingly, the district court correctly settled on intermediate scrutiny, the "more relaxed inquiry" applicable to restrictions on commercial speech. [3] The Trade Associations failed to raise any compelling actual or hypothetical examples of non-commercial representations that, in offending the statute, would compel a finding of its unconstitutionality or at least trigger strict scrutiny. As the district court observed, the statute only applies to representations that a "specific consumer good" possesses a "particular environmental attribute." [4] In addition, the district court correctly determined that § 17508.5 escapes strict scrutiny because it does not embrace non-commercial messages inextricably linked with commercial speech. [5] The district court established the basis for intermediate scrutiny by determining correctly that § 17508.5

is directed only at commercial speech and does not collaterally stifle more privileged speech.

[6] Given the nexus between commercial representations and consumption, the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation. [7] Section 17508.5 increases certainty in the market both on the demand and the supply side. [8] In setting rather modest minimum targets for the recycled content and decomposition periods of consumer products, the statute creates an incentive for manufacturers of noncomplying products to enhance the environmental attributes of their goods in order to capture the benefits of green labelling. This incentive directly furthers California's substantial interest in promoting resource conservation and reducing the burden on its brimming landfills.

[9] The Trade Associations incorrectly contended that § 17508.5 was unconstitutional under the "far-less-restrictive means test." [10] Alternative statutes are *less* precise and potentially more inhibiting of truthful environmental representations. [11] Other potential alternatives were not clearly less burdensome than adherence to uniform definitions.

[12] Thus, the district court correctly determined that intermediate scrutiny governed § 17508.5, and its conclusion that the statute passed muster under intermediate scrutiny was affirmed.

Judge Noonan dissented, writing that the statute violates First Amendment free speech guarantees. He found the language unconstitutionally vague and potentially misleading. The statute, he wrote, is vague in the standard set, has a rough and speculative relation to the interests of the state, and discriminates among speakers.

COUNSEL

Floyd Abrams, Cahill, Gordon and Reindell, New York, New York, for the plaintiffs-appellants.

Albert N. Sheldon, Deputy Attorney General, San Diego, California, for the defendant-appellee.

Barbara Olshasky, Environmental Defense Fund, New York, New York, for the intervenors-appellees.**

Maria Savasta Kennedy, Rosen, Bien, & Asaro, San Francisco, California, for the intervenors-appellees.

OPINION

CHOY, Circuit Judge:

Appellants, the Association of National Advertisers, Inc., *et al.* (Trade Associations), appeal the district court's grant of summary judgment upholding the constitutionality of California Business and Professions Code § 17508.5. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

**Briefs of *amici curiae* urging reversal were filed in support of the plaintiffs-appellants by the Washington Legal Foundation and by the Media Institute in conjunction with Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox, Inc., the National Association of Broadcasters and Providence Journal Company.

Briefs of *amici curiae* urging affirmance were filed in support of the defendant-appellee by the California Resource Recovery Association, Washington Citizens for Recycling, the National Resources Defense Council, Solana Recyclers, San Diego Recycling Company, Weisco Recycling, Envirothene Plastics, Inc., Talco Plastics, Wellman Inc., and Enviroplastics; the Center for Science in the Public Interest and Public Voice for Food and Health Policy; and the States of Minnesota, Tennessee, Connecticut, Massachusetts, Texas and Washington.

I. FACTUAL AND PROCEDURAL BACKGROUND

Section 17508.5 makes it unlawful for a manufacturer or distributor of consumer goods to represent that its products are "ozone friendly", "biodegradable", "photodegradable", "recyclable" or "recycled" unless their goods meet the statute's definitions of those terms. *See* Appendix. In 1990, the California Legislature enacted this statute in the wake of a report on environmental advertising issued by a ten-state task force of state attorneys general (the Task Force). This report summarized the findings of the Task Force from a public meeting it convened in March 1990 to address the potential for abuse raised by the increasing popularity of what the attorneys general characterized as "[g]reen marketing . . . the marketing craze of the 1990's."

The Task Force found disparities in the usage of these terms by different firms and noted the assertions of environmental groups and business representatives that there was "growing confusion surrounding many environmental marketing claims" creating a "fertile ground for abusive business practices." *Ass'n of Nat'l Advertisers, Inc. v. Lungren*, 809 F. Supp. 747, 750 (N.D. Cal. 1992). The Task Force further discerned a "wide degree of consensus among business and environmental groups" on the need for "development of national standards, guidelines or definitions to guide business in making environmental claims and to help consumers understand the claims made." Section 17508.5 is an attempt to implement these findings at the state level.

In February 1992, the Trade Associations responded to the passage of section 17508.5 by bringing suit in the Northern District of California against the attorney general of California, Appellee Daniel Lungren (Lungren or California). The Trade Associations sought a declaration that section 17508.5 impermissibly restricts both commercial and non-commercial speech and is unconstitutionally vague. They also pursued a permanent injunction against the statute's enforcement.

Appellees, the Californians Against Waste and the Environmental Defense Fund (collectively referred to as "CAW"), intervened.

The district court held that the statute was adequately tailored to further substantial state interests in consumer and environmental protection and, accordingly, complied with the First Amendment. The Trade Associations appeal this ruling here on the basis that (1) the district court erred in concluding that section 17508.5 regulates only commercial speech; (2) the district court erroneously analyzed the statute under an intermediate standard of scrutiny inapplicable to non-commercial speech, or to commercial speech inextricably intertwined with more privileged expression; and (3) the district court misapplied intermediate scrutiny by ignoring far less restrictive alternatives to section 17508.5 and mistakenly finding that the statute directly advances a substantial governmental interest.[1]

II. DISCUSSION

A. *Intermediate scrutiny governs section 17508.5.*

The Trade Associations contend that the district court erred in holding that section 17508.5 regulates only commercial speech. They further assert that as a result the district court applied to the statute an unduly deferential standard of review, the intermediate scrutiny governing commercial speech. We disagree.

A district court's interpretation of a statute presents a question of law reviewed de novo. *United States v. Freeman*, 6 F.3d 586, 592 (9th Cir. 1993).

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[1]In addition, the district court accepted the Trade Associations' contention that the statute's definition of "recyclable" was unconstitutionally vague, but otherwise rejected their challenge of section 17508.5 for vagueness. This ruling has not been appealed.

[1] We agree with the district court that "the messages regulated by section 17508.5 possess the three characteristics recognized by the Court as constitutive of commercial speech" in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *Lungren*, 809 F. Supp. at 754. In *Bolger*, the Court struck down a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives under the First Amendment. In doing so, the Court set out three characteristics which, in combination, supported its conclusion that the informational pamphlets at issue constituted commercial speech, including (i) their advertising format, (ii) their reference to a specific product, and (iii) the underlying economic motive of the speaker. *Bolger*, 463 U.S. at 67.

Here, the district court reasonably found all three of these factors present. Judge Patel observed:

> First, by its explicit terms, the statute regulates representations concerning a specific consumer good which take the form of advertisements or product labels. Second, section 17508.5 specifically requires that the representation be made about a specific consumer good which a firm manufactures or distributes. Third, there is little doubt that by touting the environmental benefits of consumer products, plaintiffs' association members hope to capture a portion of the "green market".

Lungren, 809 F. Supp. at 754.

[2] Accordingly, the district court correctly settled on the "more relaxed inquiry" applicable to restrictions on commercial speech. *Id.* at 751, *citing Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). Under this intermediate scrutiny, the asserted governmental interest must be "substantial", rather than "compelling", and the regulation adopted must "directly advance" this interest, rather than be "precisely drawn". *See Central Hudson Gas v. Pub. Serv.*

Comm'n of N.Y., 447 U.S. 557, 566 (1980); *Consolidated Edison*, 447 U.S. 530, 540 (1980).

We are not persuaded that the district court "basically redrafted the statutory language" in order to avoid strict scrutiny. In the Trade Associations' view, section 17508.5 applies on its face to any " 'representation' about certain environmental characteristics of consumer goods made by any 'person' who manufactures or distributes those goods." In support of this interpretation, the Trade Associations first point to the statute's supposed title, "environmental representations relating to consumer goods." Insofar as this "title" was added by the editors of West's Publishing Co., it affords scant insight into the statute's intended ambit.

The Trade Associations also object that, in the absence of exemptions for statements "designed to inform and persuade the public", a manufacturer or distributor could conceivably fall afoul of section 17508.5 by using a non-conforming definition of one of the statutorily defined terms to make a political, editorial or otherwise non-commercial representation. This possibility, they contend, exposes them to the hazards of "content or viewpoint censorship," chills privileged speech and renders the statute unconstitutional.

[3] However, the Trade Associations fail to raise any compelling actual or hypothetical examples of non-commercial representations that, in offending the statute, would compel a finding of its unconstitutionality or at least trigger strict scrutiny. As the district court observed:

> [S]ince the statute only applies to representations that a specific consumer good possesses a particular environmental attribute, plaintiffs' examples are all unavailing. Educational advertisements which laud the benefits of tin cans in general are not representations concerning the environmental attributes of a particular consumer good, and therefore do not

> offend the statute. Similarly, informational advertisements that contain generalized expressions of an environmental attribute are not within the statute's ambit. Finally, a firm's statement that it supports recycling is certainly not a representation concerning a consumer good.

Lungren, 809 F. Supp. at 752.

We bear in mind that "[a] statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981). The district court's interpretation is more than "fairly possible". As the district court observed, the preamble specifies that only representations pertaining to the speaker's own products give rise to potential liability. In addition, the district court reasonably attributed some significance to the California legislature's placement of section 17508.5 in the middle of Part 3, Chapter 1 of the code, entitled "Advertising", and, more specifically, in Article 1 of Chapter 1, entitled "False Advertising in General". In conjunction with the three *Bolger* factors analyzed by the district court and the limiting language in the statute's preface, the placement of section 17508.5 amidst provisions more generally governing advertising and, in particular, false advertising, betokens the statute's commercial subject matter and the California legislature's intent to regulate misrepresentations made in a commercial context exclusively.

We are also not persuaded that the Court "expressly rejected" the district court's interpretation of *Bolger's* guidance as to the commercial/non-commercial dichotomy in *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), an opinion handed down in the interim between Judge Patel's decision and this appeal. In *Cincinnati*, the Court struck down a municipal ban on newsracks containing "commercial handbills" which exempted newsracks contain-

ing "newspapers" with non-commercial elements. The Court held that there was not a reasonable fit between the content-based ban and the city's legitimate interest in safety and esthetics, insofar as "respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain of Cincinnati's sidewalks." *Id.* at 1514.

While *Cincinnati* devotes considerable attention to the uncertain contours of commercial speech and its least privileged "core", 113 S. Ct. at 1511-1513, it does not abolish the commercial/non-commercial speech distinction or the three-part test enunciated in *Bolger* and applied by the district court. *See Outdoor Systems, Inc. v. City of Mesa*, 997 F.3d 604, 610 (9th Cir. 1993) (concluding in light of *Edenfield v. Fane*, 113 S.Ct. 1792, 1798 (1993) that the "commercial-noncommercial analytical distinction still exists"). Rather than adapt or abandon the distinction between commercial and non-commercial speech, the Court in *Cincinnati* merely reiterated that allegedly core commercial speech must be " 'examined . . . carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.' " 113 S. Ct. at 1513, *quoting Bolger*, 463 U.S. at 66.

The district court followed this guidance in its examination of section 17805.5. It diligently parsed the statutory definitions and analyzed numerous examples of speech allegedly in danger of being chilled by the statute. *Lungren*, 809 F. Supp. at 754, 760-62. With the exception of the term "recyclable", deemed unduly vague, the district court satisfied itself after thorough analysis that section 17508.5 would neither stifle non-commercial expression by manufacturers and distributors nor create unconstitutionally excessive uncertainty for such merchants in their use of the regulated terms in commercial speech.

[4] In addition, the district court correctly determined that section 17508.5 escapes strict scrutiny because it does not

embrace non-commercial messages inextricably linked with commercial speech. Where commercial and non-commercial speech are inseparable, strict scrutiny is required. *Fox*, 492 U.S. at 477. Applying the *Fox* test for severability of commercial and non-commercial speech, the district court reasonably concluded that editorializing was not essential to product advertising. *Lungren*, 809 F. Supp. at 753 ("[w]hile statements that a firm supports recycling, for instance, are undoubtedly included in advertisements as a marketing tool and may in fact augment sales, firms can nevertheless sell their wares without editorializing about the environment"). Conversely, the district court persuasively reasoned that a firm can editorialize about the environment, lambast the statute or laud recycling without advertising or otherwise making commercial representations about one of its products. *Id.* at 754. Insofar as these activities are severable and separately treated under section 17508.5, the district court appropriately selected intermediate scrutiny.

The Trade Associations also argue that restrictions on commercial speech only become subject to intermediate scrutiny where the governmental interest they further relates directly to the distinction between commercial and non-commercial speech. Here, they contend, the "District Court has run afoul of the very holding of *Cincinnati* that commercial speech may *not* be treated differently from non-commercial speech when the distinction between the two bears no relationship to the interests that the State has asserted."

Cincinnati, involving municipal beautification efforts, is readily distinguishable from the instant case, involving protection of consumers against potentially misleading commercial speech. Citing *Bolger*, 463 U.S. at 81, the Court in *Cincinnati* marked the boundaries of its "narrow" ruling by noting that:

> Cincinnati has not asserted an interest in preventing commercial harms by regulating the information dis-

> tributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.

Cincinnati, 113 S. Ct. at 1515. The Court emphasized that, insofar as the attractiveness of a newsrack was unrelated to its contents, the city's restriction based on commercial content "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 1514. Here, as explained further below, California *has* asserted an interest in preventing commercial harms, and the distinction between commercial and non-commercial speech is directly related to that interest. As the district court concluded, merchants' commercial representations about the environmental attributes of their wares are far more likely to mislead consumers than their editorial commentary opposing the statute or encouraging recycling and use of biodegradable materials.

[5] In sum, we conclude that the district court established the basis for intermediate scrutiny by determining correctly that section 17508.5 is directed only at commercial speech and does not collaterally stifle more privileged speech.

B. *Section 17508.5 withstands intermediate scrutiny.*

The Trade Associations assert that section 17508.5 fails to withstand intermediate scrutiny, even assuming its applicability, because the statute prohibits truthful and accurate commercial speech, fails to advance directly any alleged government interest, and is more restrictive than necessary to serve its supposed interests. We disagree.

The constitutionality of a statute is a question of law reviewed de novo. *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 962 (9th Cir. 1986).

1. *Section 17508.3 restricts potentially misleading speech.*

Central Hudson enunciated a four-part test for gauging the constitutionality of a statute subject to intermediate scrutiny. The first part of the *Central Hudson* test requires a determination of whether the speech in question "is protected by the First Amendment. For commercial speech to come within that provision, it must at least concern lawful activity and not be misleading." 447 U.S. at 566. Establishing a benchmark for the application of this factor, the Court in *Central Hudson* postulated that "[t]he government may ban commercial messages which are more likely to deceive the public than to inform it. *Id.* at 563.

The district court held that "the environmental advertisements in question are at least potentially misleading to the public and therefore some form of regulation is justified." *Lungren*, 809 F. Supp. at 756. In doing so, it rejected the CAW's position that the commercial speech at issue "is inherently misleading and therefore not protected by the First Amendment at all." *Id.* at 755, n.7.

This ruling was correct. The following four factors govern whether commercial speech enjoys the protection of the First Amendment: (i) whether the speech restricted is devoid of "intrinsic meaning"; *Friedman v. Rogers*, 440 U.S. 1, 12 (1978) (ii) the "possibilities for deception", *id.* at 13; (iii) whether "experience has proved that in fact such advertising is subject to abuse," *In re R.M.J.*, 455 U.S. 191, 203 (1982); (iv) the ability of the intended audience to evaluate the claims made." *Id.*

Whether the terms regulated by section 17508.5 are misleading or informative as used in representations about consumer products depends in large part on the proximity of recycling facilities, the composting techniques of local landfills, and other circumstantial factors objectively ascertainable, with some difficulty, by the consumer. In locales where

consumers have access to facilities and technologies favoring recycling and speedy decomposition, the terms subject to section 17508.5 may accurately inform the consumer that the product is environmentally sound in some measure. In the less favorable circumstances prevailing in many areas of California, use of the same terms could well be misleading. Depending on these contingencies, use of the regulated terms may or may not be deceptive, and is accordingly only "potentially misleading".

Contrary to the CAW's assertions, *Friedman* does not undermine this conclusion. In *Friedman*, the Court upheld a complete ban on optometrists' use of trade names in practising their profession as furthering a substantial state interest in preventing deception of consumers. The Court underscored that "[h]ere, we are concerned with a form of commercial speech that has no intrinsic meaning" and only "ill-defined associations . . . with price and quality." *Friedman*, 440 U.S. at 12-13. In contrast, the terms regulated by section 17508.5 may be imprecise, but they are not altogether fanciful or inherently uninformative. "Recycled", for example, conveys at least a modicum of information informing the consumer that the product consists in some measure of reused resources, even if the source of recapture may be uncertain. In contrast, the trade names at issue in *Friedman* consisted largely of more fleeting or at least subjective associations rather than anything resembling "intrinsic" meaning for purposes of the first factor of the test enunciated in that case for determining whether commercial speech merits First Amendment protection.

As discussed more fully below, we find further support for affording limited protection to the speech regulated by section 17508.5 in the remaining three factors governing this inquiry, focusing on its potential for deception in light of the lessons of experience and the nature of the target audience. Accordingly, we deem the statute to comport with the first part of the *Central Hudson* test.

2. *California's interests in environmental and consumer protection are undisputed.*

The parties agreed that California had a substantial governmental interest in ensuring truthful environmental advertising and encouraging recycling. Therefore, the district court properly concluded that "[t]he second part of the *Central Hudson* inquiry requires no discussion." *Lungren*, 809 F. Supp. at 756.

3. *Section 17508.5 directly advances undisputed governmental interests.*

As to the third part of the *Central Hudson* test, the district court correctly noted that the fit between the governmental interest and the legislative means chosen to promote it "need not be perfect, but simply reasonable." *Id.* at 757, *citing Metromedia, Inc. v. San Diego*, 453 U.S. 490, 509 (1981) (plurality). Put somewhat differently, the First Amendment and the third prong of *Central Hudson* require only that, in the commercial context, the speech-restrictive means chosen provide more than "ineffective or remote support" for a legitimate governmental policy goal. *Central Hudson*, 447 U.S. at 564.

Applying this test, the district court found that section 17508.5 "directly advances the asserted governmental interest." *Lungren*, 809 F. Supp. at 757. In reaching this conclusion, the district court deemed reasonable "the California legislature's belief that uniform standards for frequently used environmental advertising terms would promote the state's consumer protection goals." *Id.*

To establish the requisite nexus between the governmental interest asserted and the measure adopted, California need not resort to a chain of complex, untested and tenuous assumptions about "conditional and remote eventualities". *See Central Hudson*, 447 U.S. at 569 (deeming asserted governmental interest in equitable distribution of the costs of sub-optimal

electricity consumption too tenuous to support regulation prohibiting utility company from inserting handbills promoting off-peak consumption in billing statements). California seeks to guard against a direct, predictable and ongoing result of green marketing—increased sales of goods as a result of potentially specious claims or ecological puffery about products with minimal environmental attributes. This supposition is sufficiently reasonable and substantiated to support the district court's finding of an adequate fit under the third prong of the *Central Hudson* test. As the district court noted:

> In holding that Puerto Rico's ban on advertising casino gambling directly advanced the government's interest in reducing the demand for gambling, the *Posadas* Court looked no further than the reasonableness of the legislature's belief that advertising casino gambling increases the demand for gambling.

Lungren, 809 F. Supp. at 757, *citing Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986).

[6] Here, as in *Posadas*, the nexus between advertising, consumer demand and the asserted governmental interests is sufficiently close. Although comprehensive economic data are lacking, the record contains abundant support for the proposition that green marketing boosts consumer demand for the allegedly recycled or biodegradable product. *See Lungren*, 809 F. Supp. at 755. Appellees and amici have cited numerous instances of advertisers making marketing claims containing misleading or inconsistent uses of the terms regulated by section 17508.5. *See* Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 Univ. Toledo L. Rev. 31 (1991). Finally, the record indicated that most consumers who purchase environmentally-oriented products discovered their alleged ecological attributes from packaging labels. In short, we find sound support for the California legislature's conclusion that ecological claims boost consumer demand for products that do not always measure

up. Given this nexus between commercial representations and consumption, the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation.[2]

a. *The consumer protection interest.*

[7] Section 17508.5 increases certainty in the market both on the demand and the supply side. The statute increases consumer knowledge and awareness and discourages exploitation and deception of the growing green market identified by the Task Force. Section 17508.5 prevents the unscrupulous advertiser from capturing the green premium that ecologically-minded consumers are increasingly willing to pay for goods whose environmental bona fides they are ill-equipped to assess. To be sure, the statute does not require labels sufficiently specific to distinguish the most ecologically sound products from those whose "green" pedigree is less pure but statutorily adequate. Nevertheless, the ten-percent threshold for "recycled" content claims and one-year maximum period for "biodegradable" and "photodegradable" claims, for example, at least permit the ecologically-minded consumer to steer clear of products whose environmental attributes are *de minimis*. The statute thus sets forth "objective and consistently applied standards" of the sort whose existence has led the Court to overturn categorical bans on speech in order to prevent deception of the public. *See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 109 (1990) (striking down regulation prohibiting references even to legitimate certification credentials on attorney's letterhead).

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[2]In its analysis of *Central Hudson*'s third prong, the district court only analyzed the fit between section 17508.5 and California's interest in ensuring truthful environmental packaging and advertising. However, California's interest in recycling—discussed by the district court in its analysis of the now essentially similar fourth prong— was likewise undisputed and further supports the district court's ruling under the third prong.

More generally, these provisions give all consumers information permitting them to make rational product comparisons and tradeoffs in price versus "greenness". While less ecologically-oriented consumers may continue to choose brands not qualifying for eco-labelling under section 17508.5, this choice will at least become a more deliberate and informed one based on more accurate and transparent claims. Accordingly, section 17508.5 increases the flow and purity of information in the marketplace. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 ("[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely").

In addition, the statute acts as a surrogate for monitoring functions which consumers cannot easily or comprehensively perform. In serving this function, section 17508.5 is not infused with the sort of paternalism decried by the Trade Associations and by the Court in *Peel*, 496 U.S. at 105 (rejecting the "paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television"). Whether a consumer protection measure is unduly paternalistic cannot be gauged without consideration of the cogency and character of the regulated class, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465-66 (1978), *Peel*, 496 U.S. at 109, the transparency of the claims, their volume and the attendant burden on consumers of monitoring them, *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 477 (1988), and the capacities and resources of the target audience to discriminate between truthful and specious claims. *See Peel*, 496 U.S. at 108; *American Home Products, Corp. v. F.T.C.*, 695 F.2d 681, 698 (3rd Cir. 1982) (taking into account "difficulty for the average consumer to evaluate . . . claims through personal experience").

One is confronted at every turn with evidence of the persuasive power and pervasive role of consumer product advertising in our daily commerce. For the individual consumer,

the purchase of a consumer good, in contrast to the choice of a lawyer at issue in *Peel*, is a routine event. As such, monitoring far more frequently encountered labelling and advertising claims about such products is proportionally far more onerous. In addition, while the majority in *Peel* rejected Justice O'Connor's dissenting view that "the public will believe that all certifications are state sanctioned," *Peel*, 496 U.S. at 105, n.13, here such a belief may more readily be presumed given the broad and widely publicized role of government in regulating the written content of food labels and other consumer product packaging. *See, e.g.*, Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990).[3]

On the supply side, section 17508.5 is also favorable to scrupulous firms and merchants. In particular, the statute benefits firms whose products are not 100% environmentally friendly but nevertheless meet the minimum thresholds. It does so by delineating with bright lines a potential safe harbor in which such firms might truthfully represent their products to be "recycled" or "biodegradable" while establishing a good faith defense against prosecution under more general statutes aimed at preventing consumer fraud, including the prohibitions on false advertising set forth in sections 17500 and 17508 of the California Business and Professional Code. In turn, section 17508.5 may again create benefits for consumers in the form of reduced prices reflecting the lower insurance

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[3]As *amici* Center for Science in the Public Interest and Public Voice for Food and Health Policy point out, regulations on deceptive advertising and labelling of foods and drugs have repeatedly been upheld against First Amendment challenges. *See, e.g., Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 324-26 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1284 (1993) (upholding Federal Trade Commission (FTC) ban on deceptive claims about the calcium content of processed cheese products); *Bristol-Myers Co. v. F.T.C.*, 738 F.2d 554, 562 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) (upholding FTC prohibitions on certain types of advertising claims about analgesics); *United States v. General Nutrition, Inc.*, 638 F. Supp. 556, 562 (W.D.N.Y. 1986) (upholding Food and Drug Administration's prohibition on certain types of nutritional claims on product labels).

premiums and legal costs that manufacturers are likely to enjoy in the more certain regulatory environment fostered by the statute. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991) (upholding forum selection clause in cruise line's form ticket in part because passengers who purchase such tickets "benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued").

In addition, the statute shields ecologically-oriented firms from unfair price competition. Rivals will no longer be able to negate such firms' green marketing edge by representing as "recycled" products consisting of dross recaptured from the factory floor rather than— in keeping with the more common understanding of the term— a significant (i.e., ten percent or more) portion of costlier reprocessed post-consumer waste. Section 17508.5 thus directly discourages free riding by environmentally-disinclined firms on ecological gains funded by consumers in the form of higher prices paid for "green" goods, and by other firms in the form of higher production costs unlikely to be recouped in a market of unregulated claims by lower-cost competitors.

b. *The environmental protection interest.*

[8] In setting rather modest minimum targets for the recycled content and decomposition periods of consumer products, the statute creates an incentive for manufacturers of noncomplying products to enhance the environmental attributes of their goods in order to capture the benefits of green labelling. This incentive directly furthers California's substantial interest in promoting resource conservation and reducing the burden on its brimming landfills. If producers of ecologically substandard products achieve the statute's minimum thresholds, these improvements translate directly into less waste being dumped and dumped waste decomposing more rapidly. If such producers fail to adapt, a considerable number of ecologically-oriented consumers may reasonably be

expected to shift in substantial measure to the products of complying firms and thereby effect the same result, additional landfill capacity and resource conservation, provided consumers can distinguish relatively green products, as section 17508.5 permits. Accordingly, section 17508.5 accords with the third prong of the *Central Hudson* test.

4. *No far less restrictive alternatives to section 17508.5 exist.*

Literally read, the fourth prong of the *Central Hudson* test requires that a restriction on commercial speech be "no more extensive than necessary to further the state's interest." 447 U.S. at 569-70. However, as noted by the district court, the Court recently explained that this test, contrary to its literal formulation, " 'requires something short of a least-restrictive-means standard.' " *Lungren*, 809 F. Supp. at 757, *quoting Fox*, 492 U.S. at 477.

In *Fox* the Court ruled that the Second Circuit erred in requiring the district court to apply a least-restrictive-means test to a state university's regulation banning private commercial enterprises from its facilities. While the Court in *Fox* instructed that a narrowly tailored regulation on less privileged commercial speech would logically pass muster, it also indicated that an even more flexible standard governs such "hardy, less likely to be chilled" expression. *Fox*, 492 U.S. at 481. The Court observed that "almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding 'far less restrictive and more precise means.' " *Id.* at 479, *quoting Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). This interpretation, coupled with the Court's unwillingness to designate "narrow tailoring" as more than an upper bound for the test governing commercial speech, suggests that the First Amendment and *Central Hudson*'s fourth prong permit a more deferential "far-less-restrictive means test" for commercial speech.

[9] The Trade Associations do not dispute this interpretation of *Fox*. However, applying this "far-less-restrictive means test", they contend that section 17508.5 is unconstitutional because the statute's alleged "blunderbuss approach sweeps so far beyond what could possibly be deemed false and deceptive that it cannot possibly provide a reasonable fit with the State's interests." We disagree.

The Trade Associations offer two purportedly far less restrictive alternatives: case-by-case prosecution of spurious environmental claims under existing false advertising statutes or adoption of a statute or regulations mandating qualifying or explanatory language to clarify use of the regulated terms not conforming with section 17508.5. The possibility of a case-by-case approach under existing statutes governing false advertising, previously opposed but newly advocated by the Trade Associations, does not undermine section 17508.5 under the fourth prong as explicated in *Fox*. The district court rejected this alternative on the basis that "nothing prevents a legislative body from adopting a specific law simply because a more general law already exists." *Lungren*, 809 F. Supp. at 758-59.

[10] More tellingly, *Fox* does not permit a restriction according with *Central Hudson*'s first three prongs to be struck down in the absence of a "far less restrictive and *more precise* means." *Fox*, 492 U.S. at 479, *quoting Shapero*, 486 U.S. at 476 (emphasis added). The prohibitions of false advertising in sections 17500 and 17508 of the Business and Professional Code require reference to vague, unspecified standards (e.g., "untrue and misleading", Section 17500; "false or misleading", Section 17508) as opposed to section 17508.5's numerically exact thresholds, to ascertain liability. These alternative statutes are *less* precise and, as the district court noted, potentially more inhibiting of truthful environmental representations. *Lungren*, 809 F. Supp. at 759. Moreover, these statutes promote a narrower range of state interests than section 17508.5, insofar as they fail to create the same

incentives for environmentally substandard firms to improve the ecological attributes of their products rather than merely harmonize their claims with production and disposal realities. Accordingly, *Central Hudson* and *Fox* do not dictate that the California legislature repeal section 17508.5 in favor of the pre-1990 statutory status quo.

The second suggested alternative, a statute requiring "more speech", runs headlong into the Court's rejection of such an approach to fourth prong analysis in *Fox*. 462 U.S. at 479. As Justice Scalia observed for the majority in *Fox*,

> In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) 'not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it.'

Id., *quoting Posadas*, 478 U.S. at 344 (emphasis in original).

[11] Here, as discussed above, the linkage between the asserted governmental interest and advertising was equally close, and the restriction less sweeping than that sustained by the Court in *Posadas*. Here, an alternative approach requiring additional speech to illuminate environmental claims was equally close at hand. Yet as the district court observed, these and other potential alternatives—including prescreening, format and content guidelines and added detail—were not clearly less burdensome than adherence to uniform definitions. *Lungren*, 809 F. Supp. at 759. In addition, as we concluded with regard to Cal. Bus. & Prof. C. §§ 17500 and 17508, it is not apparent that use of the regulated terms with qualifiers would advance California's second asserted interest, environmental protection.

More importantly, the district court need not make finely calibrated determinations of this sort where the alternatives are closely balanced. *Fox* and *Posadas* support the district court's conclusion that in the commercial context, "the Supreme Court has specifically rejected the notion that the court should second guess a legislative decision to restrict speech rather than to require more speech." *Id.* (citation omitted).

To be sure, there is inevitably a degree of arbitrariness in the legislative determination of where along the continuum of recycled content percentages or decomposition timetables a product becomes "recycled" or "biodegradable". But *Fox* and *Posadas* leave scant judicial latitude to disturb such legislative determinations where, as here, the thresholds drawn do not appear unduly prohibitive and leave considerable room for both more privileged editorial commentary and, in the commercial context, alternative expressions conveying perfectly well information about the modest environmental attributes of products not measuring up under section 17508.5 (e.g., "this product contains x% [*reused/recaptured*] materials," in lieu of "recycled"; "these trash bags will decompose in two years under x conditions," in lieu of "biodegradable"). *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (intermediate scrutiny requires that restrictions on speech " 'leave open ample alternative channels for communication of the information' ") (citation omitted). Accordingly, we affirm the district court's ruling that "the California legislature has stayed within constitutional parameters in restricting commercial expression," *Lungren*, 809 F. Supp. at 759.

III. CONCLUSION

[12] The district court correctly determined that intermediate scrutiny governs section 17508.5. Its conclusion that the statute passes muster under intermediate scrutiny is **AFFIRMED.**

APPENDIX

§ 17508.5. It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of the ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14909.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

NOONAN, Circuit Judge, dissenting:

I accept the majority's conclusion that the speech made criminal by this statute is commercial speech. I follow the doctrine of the Supreme Court that commercial speech is, ordinarily, more subject to state regulation than noncommercial speech. I have no doubt at all that untrue or deceptive advertising can be outlawed. I see no problem in the government prescribing precise labels for what cures our bodies or goes into them, or goes into a gas tank. But I have great difficulty in seeing this statute as anything other than a zealous and unconstitutional intrusion by a state government into an area where technologies are developing, the free play of ideas is important, and the free speech of everyone, including manufacturers and distributors, is essential to the development of a healthy environment. Tested by our Bill of Rights, the statute is defective.

To begin with, several of the definitions imposed on manufacturers and distributors under criminal penalties are unconstitutionally vague. Three definitions have a common deficiency: the use of nature as an intelligible standard in an environment and economy where there is scarcely any "nature" independent of human intervention. "Ozone-friendly" and "any like term" (a bit of extra vagueness) are defined as a chemical or material that "will not migrate to the stratosphere and cause unnatural and accelerated deterioration of the ozone." California Bus. and Prof. Code § 17508.5(a). What is unnatural deterioration of the ozone? How is unnaturalness to be determined? What state of the universe is assumed to be the natural state as far as ozone is concerned? The statute affords no guidance. It compels the advertiser to determine at the peril of criminal penalties that the product advertised does not have this elusive metaphysical quality.

Less obviously, because "natural" may seem less problematic than "unnatural," but just as effectively, the statutory definitions of biodegradable and photodegradable are vague in

their use of nature as the standard for the products advertised. To be biodegradable under the criminal law of California the product must be decomposable through "natural processes." What is a "natural process"? Is it one in which there is no human intervention? Is the implicit assumption of the statute that nature is one thing and human activity another, so that if human intelligence intervenes the process is no longer natural? The same questions are latent in the definition of photodegradable in terms of ability to decompose by "physical processes, such as exposure to heat and light," where "physical" is a stand-in for "natural." The advertiser is left to speculate what degree of human intervention will sully the natural and so lead to noncompliance with the statutory command.

As for "recyclable" and "recycled", what is recyclable should eventually be recycled. One would expect the definition of the two terms to be in tandem. The statute, however, adopts one definition of "recyclable" and another of "recycled", so that what is "recyclable" will not necessarily be "recycled" when re-use is made. "Recyclable" has now been held to be defined in a fashion incomprehensible to a manufacturer or distributor of ordinary intelligence. Does striking it from the statute make "recycled" more intelligible by removing the statute's inconsistency? Arguably, yes, although a lingering doubt remains about the surviving definition which in its origin was so flawed.

There is an additional flaw. "Recycled" is not completely defined by the statute at issue but by cross-reference to the Public Contract Code § 12200(b). The difficulty with this definition is as follows: For the regulation of commercial speech to be sustainable under the First Amendment there must be at least a reasonable fit between the statute and the state's goal. *United States v. Edge Broadcasting Co.*, 61 U.S.L.W. 4759, 4762 (1993). The Public Contract Code's definition of "postconsumer waste" takes no account of the differences among the principal materials subject to recycling — glass,

metal, paper, and plastic — nor the different technologies by which recycling of these materials may be accomplished. As the Environmental Protection Agency has observed: "it is not clear that a commonly accepted, sound basis exists setting content percentages across many products." EPA, *Request for Comments; Guidance for Use of the Term 'Recycled' and 'Recyclable' and the Recycling Emblem in Environmental Marketing Claims*, 56 Fed. Reg. 49,992, 49,996 (1991). In the statutory definition of recycled, the vagueness inheres not in the definition but in the fit between the definition and the state's interest. At best it is a speculation that there is any connection between protection of the environment, encouragement of environmentally sensitive advertisers, and protection of environmentally conscious consumers and the blunderbuss definition of "postconsumer waste" which serves as a crude guide in public purchasing.

The statute has other constitutional infirmities. The district court noted that to avoid the reach of the First Amendment the words that the statute defined must be "sufficiently deceptive." As to whether the words were in fact "sufficiently deceptive," the district court candidly acknowledged that it found "no easy answer." The strongest thing the district court could say about the restricted words was that, without the state's help, they were "potentially misleading." To substantiate that characterization the district court cited a letter from the attorney general's office to the governor which "opined" that there had been "an increase" in "questionable 'environmental' advertising." No actual instances of deception were cited; the letter was written as advocacy for enactment of the statute. The district court also cited a letter from the sponsor of the legislation to the governor. This letter did indeed give two examples, one involving the use of "biodegradable," the other of "recyclable." The second example, however, led nowhere, because the district court removed "recyclable" from the statute; so that only one instance of one word, cited by a partisan of the statute and unproved in court, is the factual basis for the conclusion that all four words are potentially

misleading. The true basis for this far-reaching conclusion, on which the majority opinion so heavily relies, is speculation. Speculation is no basis on which to support a criminal law licensing speech. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

Even if, contrary to the record in this case, the presumption were indulged that a factual predicate of potential deceptiveness had been established, such facts would not justify the state's invasion of freedom of speech. A variety of words are commonly used in American advertising, all of which are potentially misleading. For example:

antique
bargain
economical
environmentally sound
naturally good

A paternalistic government might decide to protect consumers by criminalizing all advertising containing these words if the product advertised failed to conform with the state's own definition. That the terms defined were capable of misleading use would be incontestable. That a criminal law of this character would violate the First Amendment would be equally incontestable. Potential misuse "does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information." *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 109 (1990). The difference between this hypothetical statute and the California criminal law at issue here is not a difference in kind or in degree. The only difference is that the California law has chosen a different set of speculatively misleading words to define and criminalize.

Why have these particular words been made the subject of legislation? Why have Californians Against Waste and the Environmental Defense Fund been allowed to enter the case

on the side of the state with the status of intervenors? Why do these intervenors defend the district court's decision with such skill, tenacity and vigor? Plainly because, as the intervenors declare, the words defined are "key environmental terms". In the Green Movement the words are powerful, evocative, almost sacred. There is a sense that they should not be profaned by casual usage. The legislation embodies a clear conviction that there are those who can be trusted to use them and those who cannot be trusted; for the legislation singles out commercial advertisers as the untrustworthy and leaves unregulated and trusted the nonprofits who believe the terms are key.

Such a distinction between speakers, made by a legislature, has a name: viewpoint discrimination. Such a distinction has a constitutional destiny, to be held a violation of the First Amendment unless, strictly scrutinized, it is shown to be narrowly tailored to serve a compelling state interest. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2438, 2547 (1992). A legislature cannot privilege one set of speakers as the good guys, while restraining another set of speakers as the baddies. When the speakers use the same language, it's not difference enough that one speaks for profit and the other for "nature."

This broad-brush, speculatively-justified statute cannot survive the test of rationality, let alone strict scrutiny. To the state's present embarrassment, the state argued in its Points and Authorities to the district court that the plaintiffs would not violate the statute if their advertising qualified the restricted terms appropriately. This argument, of course, rewrote the statute, was ignored by the district court, and is abandoned by the state on this appeal. But the abandoned argument does point to the obvious, that with a minimum of effort the legislature could have provided that qualified use of the terms was acceptable. The legislature tacitly conceded as much by accepting in the statute itself any definitions "established in trade rules adopted by the Federal Trade Commission." If potential misuse was the problem, it would

have been possible to do as the FTC may sometime do and as Maine in fact does do, provide a governmental definition of "recycled content," but permit any "properly qualified statement of fact" addressed to consumers. Maine Rev. Stat. Ann., Title 38, § 2141.2. When such means could be used to attain the legislative end, the present fit is too rough to be rational.

In summary, the statute in question, criminalizing the use of specific words in commercial speech, is vague in the standard set; has a rough and speculative relation to the interests of the state; and discriminates among speakers. The statute is incompatible with the freedom assured by the First Amendment.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C-92-0660 MHP

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE AMERICAN PAPER INSTITUTE, INC., THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and CHAMBER OF COMMERCE OF THE UNITED STATES

Plaintiffs,

—vs.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California

Defendant.

OPINION

Plaintiffs The Association of National Advertisers, *et al.*, bring this action against defendant Daniel Lungren, in his official capacity as Attorney General of the State of California.[1] Plaintiffs challenge section 17508.5 of the California Business and Professions Code, which regulates certain environmental claims used in advertising, on the grounds that: (1) the statute violates plaintiffs' First Amendment rights, and

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[1] Pursuant to rule 24(a) of the Federal Rules of Civil Procedure, this court previously granted defendant-intervenor status to Californians Against Waste and the Environmental Defense Fund.

(2) it is unconstitutionally vague. The matter is presently before the court on plaintiffs' motion for summary judgment. After carefully considering the submissions and arguments of the parties and the amici,[2] the court enters the following Order and Opinion.

I. BACKGROUND

In March 1990 a ten state task force of Attorneys General conducted public hearings to discuss the problems generated by the use of potentially misleading environmental advertising claims. Based on the testimony and written submissions of representatives from industry, consumer and environmental groups, the task force found:

> "Green marketing" has become the marketing craze of the 1990's. The American public is increasingly concerned about environmental issues, and people are looking for ways to do their part to protect and restore our nation's resources. As consumers have become more aware of the environmental impacts of the products they purchase, environmental awareness has begun to influence purchasing decisions.
>
> The increasing interest in the environmental consequences of purchasing decisions has not been lost on the business community. . . . Many companies have begun claiming that their products provide some benefit to the environment. . . . This marketing strategy, which has become known as "green marketing," can be informative to conscientious consumers when it is used honestly. Unfortunately, attempts to take advantage of consumer interest in the environment have led to a growing number of environmental claims that are trivial, confusing or even misleading.

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[2] The Media Institute filed a brief of amicus curiae in support of plaintiffs and the States of Minnesota, Tennessee, Massachusetts and Washington (collectively) submitted a brief of amicus curiae in support of the State of California.

Joint Stipulation ("JS"), Ex. 10 at 1. Specifically, the task force noted that, in response to the growing consumer desire to purchase "environmentally safe" products, businesses advertised hundreds of products as "degradable," "recyclable," "recycled," and "ozone friendly." *Id.* at 5.[3]

California has also experienced an increase in the amount of environmental product advertising in the years prior to the enactment of section 17508.5. JS ¶ 49. Moreover, the terms employed in these advertisements are used differently by advertisers when claims are made about a product's environmental attributes. JS ¶ 23. In other words, not all firms mean the same thing when they label their products "ozone friendly," "recyclable," or the like. As the Attorneys General explained:

> Both environmental groups and business representatives noted the growing confusion surrounding many environmental marketing claims and stated their belief that such confusion was fertile ground for abusive advertising practices. . . . [T]he words commonly used in environmental marketing, such as "environmentally friendly," "degradable," "recyclable," and "ozone friendly" have no clear, uniform meaning. Different manufacturers use the terms to promote different environmental benefits.

JS, Ex. 10 at 13.[4]

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[3] According to the task force, products making environmental claims constituted over 9 percent of all new products introduced in the United States in the first half of 1990, a twenty-fold increase since 1985. JS, Ex. 10 at 5 n.3.

[4] As a result of their findings, the task force recommended that uniform definitions be established to govern environmental marketing claims. After issuing its report, the Attorneys General held a second set of hearings to obtain comments on their findings and recommendations. Plaintiff The American Paper Institute, Inc. ("API") concurred with the task force's recommendation, testifying that they too saw the need for definitions to provide meaning to environmental marketing claims: "API believes that some form of standardized definitions and guidelines should be developed to provide meaning to environmental terms used in product advertising and labeling." JS, Ex. 9 at 1.

It was in this climate that the California legislature in September 1990 passed AB 3994, the Environmental Advertising Claims Act which, *inter alia*, added section 17508.5 to the California Business and Professions Code ("section 17508.5"). The statute, entitled "Environmental Representations Relating to Consumer Goods," provides that:

> It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission.

Cal. Bus. & Prof. Code § 17508.5.[5]

The sole issue before this court is whether the California legislature, in its effort to regulate the "green marketing" phenomenon, has run afoul of the Constitution.

II. LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (the nonmoving party may not rely on the pleadings but must present significant prorative evidence supporting the claim). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Moreover, the inferences to be drawn

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[5] The entire text of section 17508.5 is set forth in the Appendix to this opinion.

from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

If the court is satisfied that no genuine issue of material fact exists, and that absent any such issue judgment may be entered as a matter of law, the court may *sua sponte* grant summary judgment to the nonmoving party. *Cool Fuel, Inc. v. Connett*, 605 F.2d 309, 311 (9th Cir. 1982); *see also Celotex*, 477 U.S. at 326 ("district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte* . . . .").

III. DISCUSSION

A. *The First Amendment*

1. *What is the Character of the Speech at Issue?*

Initially the court must examine the character of the speech regulated by section 17508.5 in order to apply the appropriate standard for reviewing the statute. To the extent that the statute restricts noncommercial messages, it is subject to strict scrutiny and "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Pub. Serv. Com.*, 447 U.S. 530, 540 (1980) (citations omitted). Regulations affecting commercial speech, however, invite a more relaxed inquiry. *See Bd. of Trustees of State* Univ. of N.Y. v. Fox, 109 S.Ct. 3028, 3033 (1989) ("Our jurisprudence has emphasized that commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.").

Plaintiffs contend that section 17508.5 sanctions *any use* of the regulated terms, thereby restricting their noncommercial expression. On this reading of the statute, plaintiffs complain that they are unable to express their policy views or publish editorial or informational advertisements aimed at inducing public activism.

The plain meaning of section 17508.5, however, supports no such interpretation. The first sentence of section 17508.5 clearly establishes that the law applies only to manufacturers and distributors of consumer goods who make certain representations about their products: "It is unlawful for any person *to represent* that any consumer good *which it manufactures or distributes* is . . . ." Cal. Bus. & Prof. Code § 17508.5 (emphasis added). Any uncertainty as to the statute's reach is mitigated by subsection (g) which provides that "a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation." *Id.* § 17508.5(g). Finally, that the statute only pertains to product advertising is gleaned from the fact that the legislature placed section 17508.5 in Part 3, Chapter 1, Article 1 of the Business and Professions Code, which is entitled "False Advertising in General."

In an effort to paint section 17508.5 as a law that restricts noncommercial speech, plaintiffs offer numerous examples of the types of political messages which are allegedly stifled.[6]

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[6] Such examples include the following:

Del Monte supports steel can recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 600 Anderson Drive, Pittsburgh, PA 15220.

This watch is a piece of junk. Its metal bearings are made entirely from recycled cans. In fact, the everyday "tin" can is made of 100% recyclable high grade steel. And if we all recycle, cans will provide the best means to build our bridges, skyscrapers, automobiles—even precision watches. The time to recycle is now.

Imagine this. A child is running down the dock at a marina to join his father for a summer sail in the family boat. Suddenly, his foot slips out of its sandal, and his bare foot scrapes across the wide planks. There are no screams of pain, no frenzied dash for the first-aid kit. Because in addition to being impervious to water, insects and weather, the dock is splinterless. It's not made of wood, it's made from recycled plastics.

In another part of the country, a young couple moves into their first home. Workmen have just installed the new wall-to-wall carpet, which has rich, vibrant colors and soft, plush pile. The new high-quality carpet is made from recycled plastics.

(*footnote continued*)

However, since the statute only applies to representations that a specific consumer good possesses a particular environmental attribute, plaintiffs' examples are all unavailing. Educational advertisements which laud the benefits of tin cans in general are not representations concerning the environmental attributes of a particular consumer good, and therefore do not offend the statute. Similarly, informational advertisements that contain generalized expressions of an environmental attribute are not within the statute's ambit. Finally, a firm's statement that it supports recycling is certainly not a representation concerning a consumer good.

In a further attempt to hoist the level of scrutiny, plaintiffs argue that their commercial advertisements are inseparable from their policy oriented speech designed to educate consumers on current environmental issues. This argument relies on *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) which held that when commercial speech is "inextricably intertwined" with fully protected speech, courts must apply the test for noncommercial speech. *Id.* at 796. *Riley* involved a state law which mandated that professional fundraisers disclose to potential donors the percentage of contributions that are actually turned over to the charitable organization. In rejecting the state's contention that deferential commercial speech scrutiny should apply because the mandatory disclosure law only governed commercial transactions, the Court explained that "[o]ur lodestars in deciding what level of scrutiny to apply to a *compelled statement* must be the nature of the speech taken as a whole and the effect of the *compelled statement* thereon. *Id.* (emphasis added). For this reason, the Court subjected the law to exacting First Amendment scrutiny.

On a snowy mountain, a skier emerges from the base lodge, wrapped snugly in a warm parka and bib-front pants. The insulating fiberfill in these outer garments is made of recycled plastics.

Sounds like science fiction? Or an optimistic projection for the year 2010? It's not. These are simply individual examples selected from the myriad of consumer and commercial products that are already being made from recycled plastics.

The Court's reasoning in *Riley* has no purchase on the instant case for the simple reason that section 17508.5 does not compel speech; it merely sets forth statutory definitions for common environmental advertising terms. Moreover, the Supreme Court has explicitly rejected a similar attempt to extend the reach of Riley's holding. In *Fox* the Court reviewed whether a University Resolution which prohibited "tupperware parties" in student dormitories violated the First Amendment. The plaintiff argued that because their demonstrations also touched on subjects such as financial responsibility and how to run an efficient home, pure speech and commercial speech were "inextricably intertwined" and the entirety should be treated as noncommercial speech. The Court, per Justice Scalia, disagreed:

> *Riley* involved . . . compelled commercial speech . . . . There, of course, the commercial speech (if it was that) *was* "inextricably intertwined" because the state law *required* it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the Resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Fox, 109 S.Ct. at 3031-32 (emphasis in original).

Like the Resolution upheld in *Fox*, section 17508.5 does not require that plaintiffs combine commercial and noncommercial speech in their advertisements. The noncommercial elements contained in plaintiffs' editorial and informational advertisements are not absolutely necessary to sell the product at issue. While statements that a firm supports recycling, for instance, are undoubtedly included in advertisements as a marketing tool and may in fact augment sales, firms can nevertheless sell their wares without editorializing about

the environment. Thus, since the advertising contemplated by section 17508.5 unquestionably proposes a commercial transaction, and since the commercial and noncommercial messages are not "inextricably linked" under *Fox*, section 17508.5 applies only to commercial speech.

The court's holding in this regard is supported by the great weight of decisional law. In *Central Hudson Gas v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the Court applied commercial speech principles in reviewing a Public Utility Commission's order banning all advertising that promoted the use of electricity. Concurring with the Court's result but not its reasoning, Justice Stevens argued that because the promotional advertising in question included claims "relating to . . . questions frequently discussed and debated by our political leaders," it should be afforded full First Amendment protection. *Id.* at 581 (Stevens, J., concurring). The majority disagreed, noting that under Justice Steven's approach, any advertisement which linked a product to a current public debate would perforce be entitled to broad constitutional protection:

> But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety . . . . [U]tilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions.

Id. at 562 n.5.

The Court affirmed this logic in *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983) by deciding that advertisements for contraceptives constituted commercial speech, "notwithstanding the fact that they contain discussions of important public issues such as the prevention of venereal disease and family planning." *Id.* at 67-68. The *Bolger* court explained that like the Public Utility in *Central Hudson*, contraceptive manufacturers enjoy the full panoply of First Amendment protection whenever they express themselves

directly on contemporary public issues. Furthermore, "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* at 68; *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7 (1985) (attorney's advertisement containing statements regarding the legal rights of persons injured by the Dalkon Shield treated as commercial speech.)

In the case at bar plaintiffs also attempt to immunize their commercial speech from state regulation by insisting that editorial or informational statements concerning current environmental policy transform their advertisements into speech deserving greater constitutional protection. The Supreme Court's reasoning in *Central Hudson* and *Bolger* counsels to the contrary. Like the regulations at issue in those cases, section 17508.5 places no general restrictions on plaintiffs' right to comment directly on current environmental policy. Plaintiffs are free to encourage recycling, or to editorialize about the environmental benefits of biodegradable plastics, or to comment on the desirability of ozone friendly products. The statute under review does not restrict the types of expression normally afforded "the full panoply" of constitutional protection.

Finally, the messages regulated by section 17508.5 possess the three characteristics recognized by the Court as constitutive of commercial speech. In Bolger the Court classified the informational advertisements under review as commercial speech because: (1) they were in the form of an advertisement, (2) they referred to a specific product, and (3) there was an economic motive behind the speech. 463 U.S. at 66-67. Though alone, none of these factors might be sufficient to turn the materials into commercial speech, the "combination of all these characteristics [compels] the conclusion that the informational pamphlets are properly characterized as commercial speech." *Id.* at 67.

First, by its explicit terms, the statute regulates representations concerning a specific consumer good which take the form of advertisements or product labels. Second, section 17508.5 specifically requires that the representation be made

about a specific consumer good which a firm manufactures or distributes. Third, there is little doubt that by touting the environmental benefits of consumer products, plaintiffs' association members hope to capture a portion of the "green market." As plaintiffs concede, California consumers "buy products based on their asserted environmental attributes." JS ¶ 48. Despite the fact that educating consumers about the environmental attributes of consumer products may well enhance environmental quality, *see e.g.*, JS ¶ 17, the primary motivation of such advertising is economic, namely, to sell products.

Although drawing the line between "purely commercial ventures and protected distribution of written materials [is] a difficult task," *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 630 (1980), First Amendment jurisprudence recognizes "the common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). For the reasons set forth above, the court concludes that the regulated speech in this case is entitled to the qualified protection accorded commercial speech.

2. *Is Section 17508.5 a Permissible Restriction on Commercial Speech?*

Having determined that section 17508.05 regulates commercial speech, the court must now determine whether the statute passes muster under the more relaxed commercial speech standards. In *Central Hudson* the Court outlined a four part inquiry for analyzing the lawfulness of restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must

> determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

As for the first step of the *Central Hudson* analysis, the Court has explained that whatever concern the First Amendment has for protecting commercial speech is rooted in the informational function of advertising. Therefore, the Constitution does not prevent prohibitions on commercial messages which are "more likely to deceive the public than to inform it." *Id.* at 563 (citation omitted). *But see Peel v. Attorney Reg. & Disciplinary Com'n*, 110 S.Ct. 2281, 2292 (1990) (categorical ban on factually accurate commercial speech that may be potentially misleading to some consumers is constitutionally infirm). Whether the terms defined in section 17508.5—ozone friendly, biodegradable, photodegradable, recyclable, and recycled—are sufficiently deceptive to place the statute beyond the reach of any First Amendment protection is a question to which, frankly, this court finds no easy answer.[7]

Arguably, there is ample evidence that advertisements which extol a product's environmental benefits are potentially deceptive. In urging California Governor Deukmejian to sign AB 3994, the Attorney General's office opined:

> In recent years we have been an increase in questionable "environmental" advertising with claims such as "environmentally friendly," "biodegradable," and "recyclable" being utilized with virtually no scientific support. . . . Environmental claims are similar to the "health" claims made for elixirs in the Old West. There was no scientific

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[7] Even the parties defending the constitutionality of section 17508.5 do not agree on this issue. For the purposes of the first part of the *Central Hudson* inquiry, defendants assume that the terms defined in section 17508.5 are not misleading and urge the court to focus its inquiry on the last three prongs of the *Central Hudson* test. *See* Def. Opp. at 42. Defendant-Intervenors, on the other hand, posit that the commercial speech in question is inherently misleading and is therefore not protected by the First Amendment at all. *See* Def. Int. Opp. at 26-29.

> or medical basis for the claims, but there was also no basis for disproving them! Thus, the claims were made, and consumers relied upon those claims in making product choices without knowing of the total absence of credible evidence to support the claims.

JS, Ex. 25. The author of the legislation, Assembly member Byron Sher, cited several examples to highlight the deceptive nature of environmental advertising claims. *See* JS, Ex. 26 (Letter from Assembly member Sher to Governor Deukmejian). For instance, one manufacturer labelled its plastic bag as being "recyclable." In reality, the product was only recyclable if the consumer returned it to the manufacturer's plant in South Carolina. In another example, disposable diapers were labelled "biodegradable" when in truth, the plastics contained in the product would biodegrade only after hundreds of years and then only in ideal conditions. *Id.*[8]

These examples might suggest that to control the problem of potentially deceptive advertising a legislative body should be allowed great deference in deciding whether marketing claims are misleading. Cf. *National Com'n on Egg Nutrition v. F.T.C.*, 570 F.2d 157, 161 (7th Cir. 1977) (agency determination on misleading nature of advertisement subject only to "substantial evidence" review). However, First Amendment analysis of commercial messages begins "with the content of the message and not the label given the message under the relevant statute." *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 651 n.9 (6th Cir.

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[8] Plaintiffs themselves recognize that the terms regulated by section 17508.5 are potentially misleading. The National Food Processors Association, the Association of National Advertisers, Inc., the Grocery Manufacturers of America, Inc. and the American Association of Advertising Agencies petitioned the Federal Trade Commission to adopt guidelines to govern environmental advertising claims. *See* JS, Ex. 13. They acknowledged that "[a]t a time when environmental concerns have reached new heights, there is a great risk of deceptive practices." *Id.* at 4. Similarly, the American Paper Institute testified before the F.T.C. urging the agency to bring uniformity to environmental advertising claims because "[t]here is considerable confusion as to the appropriate content and context of such claims." JS, Ex. 14 at 2.

1991) (citation omitted); *see also Peel*, 110 S.Ct. at 2291-2292 ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review.").

It is the role of this court to exercise its independent judgment and determine whether the commercial messages in question warrant any First Amendment protection. If First Amendment scrutiny in the commercial speech arena is to have any bite at all, a legislative body cannot justify its restrictions on commercial speech simply by declaring that marketing claims are misleading. *See Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriquez*, 747 F. Supp. 836, 343 (D. Puerto Rico 1990) ("Wooden deference to a state's determination as to the misleading nature of an advertisement would obviously place in jeopardy some commercial speech that is in fact not misleading and thus deserving of at least limited First Amendment protection."). For this reason, the court cannot say that due to their allegedly misleading nature, the commercial messages at issue are not protected by the First Amendment at all.[9] However, the environmental advertise-

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[9] Defendant-Intervenors' reliance on *Friedman* v. *Rogers*, 440 U.S. 1 (1978) to support their claim that the deceptive advertising addressed by section 17508.5 falls outside the orbit of First Amendment protection is misplaced. In *Friedman* the Court upheld a complete ban on the use of trade names in optometrists' advertisements because of the numerous possibilities for deception. The Court emphasized, however, that trade names have no intrinsic meaning and convey no information whatsoever about the nature of the services offered by an optometrist. *Id.* at 12. Moreover, the Court qualified its holding by explaining that restricting the use of trade names "has only the most incidental effect on the content of the commercial speech of . . . optometrists." *Id.*

By the same token, plaintiffs' reliance on *Peel* is misplaced. The *Peel* Court held that the potentially misleading nature of an attorney's statement on his letterhead that he was a "Certified Civil Trial Specialist" did not justify a "categorical ban" on such statements. 110 S. Ct. at 2292. But the Court explained that less restrictive regulations of commercial speech would be permissible: "to the extent that potentially misleading statements of private certification of specialization could confuse consumers, a State might consider screening certifying organizations, or requiring a disclaimer about the certifying organization or the standards of a specialty." *Id.*

ments in question are at least potentially misleading to the public and therefore some form of regulation is justified. Whether the regulation embodied in section 17508.5 survives First Amendment scrutiny is answered by considering the remaining elements of the *Central Hudson* test.

The second part of the *Central Hudson* inquiry requires no discussion for the parties agree that California's governmental interest in ensuring truthful environmental advertising and encouraging recycling and environmentally sound packaging is substantial.

The third prong of the *Central Hudson* test provides that regulations on commercial speech "directly advance" the governmental interest at stake. If a restriction provides only "ineffective or remote support" for the government's asserted policy goal, it fails under the First Amendment. 447 U.S. at 564. Likewise, "conditional and remote eventualities simply cannot justify silencing . . . promotional advertising." *Id.* at 569. The *Central Hudson* Court held that because there was an "immediate connection" between advertising and consumer demand for electricity, the government's interest in energy conservation was directly advanced by Public Utility Commission's order banning promotional advertising by electrical utilities. *Id.*

To reduce deceptive environmental advertising, section 175085 requires that when used by manufacturers or distributors of consumer goods in advertising or labels, the terms "ozone friendly," "photodegradable," "biodegradable," "recyclable" and "recycled" must meet the statutory definitions contained therein. The statute is premised on the belief that consumers have difficulty determining the veracity of the environmental claims advertisers make concerning consumer products. Given the confusion over what advertisers mean when they state, for example, that a product is recyclable or biodegradable, the legislature sought to level the playing field for all advertisers by requiring that they mean the same thing when using the terms set forth in the statute. As in *Central Hudson* there is an immediate connection in this case between environmental advertising and sales. Section 17508.5 governs

how manufacturers and distributors advertise the environmental attributes of their products and thereby decreases the chance that consumers will be misled by the use of undefined environmental terms.[10] For these reasons, the link between the uniform definitions mandated by section 17508.5 and the goal of ensuring that consumers understand the claimed environmental attributes of products is neither "tenuous" nor "speculative." *See Central Hudson*, 447 U.S. at 569.

In *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) the Court explained that "[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 341. In *Fox* the Court clarified that the requisite fit need not be perfect, but simply reasonable. 109 S. Ct. at 3035; *see also Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion) (third prong of *Central Hudson* test satisfied where legislative judgment is not "manifestly unreasonable"). In holding that Puerto Rico's ban on advertising casino gambling directly advanced the government's interest in reducing the demand for gambling, the *Posadas* Court looked no further than the reasonableness of the legislature's belief that advertising casino gambling increases the demand for gambling. 478 U.S. at 342. Similarly, the California legislature's belief that uniform standards for frequently used environmental advertising terms would promote the state's consumer protection goals, is clearly reasonable. Thus, the court finds that the statute under review directly advances the asserted governmental interest."[11]

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[10] The ten state task force of Attorneys General came to the same conclusion: "Uniform definitions are needed . . . to ensure that marketers know what properties their products must possess before they can make these claims and to ensure that consumers get the accurate information they need to make informed purchasing decisions based on environmental considerations." JS, Ex. 3 at 1.

[11] Plaintiffs find great solace in *Lever Bros. Co.* v. *Maurer*, 712 F. Supp. 645 (S.D. Ohio 1989) where the court found that prohibiting use of the word "butter" on labels and advertisements except for products that were 100 percent butter did not directly advance the government's

Under the fourth prong of the *Central Hudson* framework, a restriction on commercial speech must be "no more extensive than necessary to further the state's interest." 447 U.S. at 569-70. Plaintiffs contend that because section 17508.5 prevents them from accurately describing their products' environmental attributes when such disclosures deviate from the statutory definitions, the statute fails to meet that standard.

If the last element of the *Central Hudson* test were interpreted strictly, as a "least-restrictive-means test," plaintiffs' reasoning might be persuasive. However, that construction was rejected in *Fox* where Justice Scalia explained that *Central Hudson* "requires something short of a least-restrictive-means standard." 109 S. Ct. at 3033. While acknowledging that past Supreme Court cases could be read to mean that restrictions on commercial speech are invalid if the governmental interest could be served as well by a more limited restriction, Justice Scalia announced that such a standard "would be incompatible with the . . . subordinate position of commercial speech in the scale of First Amendment values." *Id.* at 3034. The Court held that the fourth prong of the *Central Hudson* test imposes upon government the burden of establishing that a reasonable fit exists between the government's interest and the means chosen to advance that interest. A government meets its burden by demonstrating that a commercial speech regulation is "not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective." *Id.* at 3035. "By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their

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interest in protecting its citizens from misleading information regarding food products when applied to a firm that sought to accurately advertise its dairy spread as containing 50 percent butter. *Id.* at 652. Plaintiffs argue that as with the word butter in *Maurer*, there is nothing inherently misleading about the terms covered by section 17508.5. The court disagrees. Unlike the word butter, terms like "ozone friendly," "photodegradable" and the like are not frequently used words enjoying a commonly agreed upon definition.

objective requires, and provide the legislative and executive branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.' " *Id.* (citation omitted).

Plaintiffs correctly point out that the restrictions on commercial speech imposed by Section 17508.5 prohibit the use of the terms in question when they don't meet the statutory definitions, even if qualifying or explanatory language is included to clarify how the term is being used.[12] For example, to make a claim that a product is recyclable, the statute provides that it must be "conveniently recycled . . . in every county in California with a population over 300,000 persons." Cal. Bus. & Prof. Code § 17508.5(d). Therefore, the statement that "this milk carton is recyclable in San Diego County" might violate the statute even if it is completely accurate. However, the fact that plaintiffs are prevented from making an accurate claim of this nature does not render section 17508.5 constitutionally infirm. Since the state has a substantial interest in encouraging recycling and reducing solid waste, it was reasonable for the legislature to require that a product can be advertised as "recyclable" only if it is recyclable in the 21 California counties with populations exceeding 300,000 people. Similarly, the truthful claim that a product is "recyclable where facilities exist" may imply to consumers that the product is recyclable in their local program even though that might not be the case. Such a claim, though factually correct, could be misleading and fail to advance the goal of encouraging recycling.

The same reasoning applies to claims regarding biodegradability. The statute requires that to tout a product as being biodegradable, it must "decompose in the most common environment where the material is disposed within one year

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[12] The Attorney General responds to plaintiffs' argument by urging the court to narrowly interpret section 17508.5 as only applying when the terms in question are used without qualifying or explanatory language. Whether it would be proper for this court to adopt such a narrowing construction on a state statute which by its terms makes no such distinction, need not be resolved. Even without a narrowing construction, the statute is sufficiently tailored to promote its objective.

through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide." Cal. Bus. & Prof. Code § 17508.5(b). The claim that a product is "biodegradable, if composted" might be truthful, but if the product is only disposed in landfills, the alleged environmental attribute actually produces no benefit.

For these reasons, plaintiffs have not convinced the court that section 17508.5 is "substantially excessive, disregarding far less restrictive and more precise means." *Fox*, 109 S. Ct. at 3034. The California legislature decided that allowing manufacturers and distributors to evade the dictates of section 17508.5 by defining the terms themselves would not promote the state's consumer and environmental protection goals. Because such a policy determination is reasonable in light of Fox, "we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* at 3035.

In a final attempt to show that section 17508.5 violates the fourth prong of the *Central Hudson* test, plaintiffs present "less restrictive" alternatives which the California legislature could have adopted to regulate environmental advertising. For example, state officials could enforce with more vigor sections 17500 and 17580 of the Business and Professional Code, which contain general prohibitions on false advertising. This argument clearly fails, for nothing prevents a legislative body from adopting a specific law simply because a more general law already exists. Plaintiffs also suggest that to cure the potential for deceptive advertising, the legislature could have required that manufacturers and distributors use disclaimers or other qualifying language where necessary. As shown above, there is a substantial likelihood that qualifying language would not further the state's interests. In addition, the Supreme Court has specifically rejected the notion that the court should second guess a legislative decision to restrict speech rather than to require more speech. *See Posadas*, 478 U.S. at 344 (it was up to the legislature to decide that the goal of deterring casino gambling was better served by suppressing commercial speech that encourages gambling than by compelling speech designed to discourage it). Finally, this

court should not query whether *any* less restrictive measures exist to accomplish the asserted goals. The Fox Court, in reciting its previous upholding of a complete ban on off-site billboard advertising, stated: "we did not inquire whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics." 109 S. Ct. at 3034 (citing *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981)).

When the *Central Hudson* Court struck down a regulation banning all advertising by an electrical utility, the Court suggested several alternatives which it considered "no more extensive than necessary" to advance the goal of promoting energy conservation. These options included prescreening advertisements to ensure that they were not at odds with the government's conservation policy, restricting the format and content of the advertising, and compelling disclosures about the efficiency of the services offered. 447 U.S. at 571 & n.13. The fact that these "limited regulations" of commercial speech are all as, if not more, restrictive than the uniform definitions provided by section 17508.5 confirms that the California legislature has stayed within constitutional parameters in restricting commercial expression.

B. *Vagueness*

In its effort to regulate the "green marketing" phenomenon, plaintiffs contend that the California Legislature drafted an unconstitutionally vague statute. Section 17508.5(a) provides that "ozone friendly, or any *like term* which connotes that stratospheric ozone is not being depleted, means that . . . ." Cal. Bus. & Prof. Code § 17508.5(a). Section 17508.5(d) states that "recyclable means that an article can be *conveniently recycled* . . . in every county in California with a population over 300,000 persons." *Id.* § 17508.5(d). It is the ambiguity of these two phrases which allegedly pose constitutional problems.

The threshold question is what vagueness standard governs a proscription on commercial speech. Ordinarily, principles of

due process dictate that a criminal statute provide "adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Buckley* v. *Valeo*, 424 U.S. 3, 77 (1976) (citations omitted). Furthermore, when a law regulates conduct protected by the First Amendment, the vagueness doctrine demands an even "greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974) (footnote omitted).

Although the vagueness doctrine has never drawn a distinction between commercial and noncommercial speech, given the lesser constitutional protection accorded commercial speech, there may be little justification for applying the exacting vagueness test which obtains when a law infringes upon fundamental interests protected by the First and Fourteenth Amendments. *Cf. Friedman v. Rogers*, 440 U.S. 1, 12 (1979) ("when dealing with restrictions on commercial speech we frame our decisions narrowly, allowing modes of regulation that might otherwise be impermissible in the realm of noncommercial expression.").

As the Court noted in *Central Hudson*, there are at least two distinguishing features of commercial speech which allow for greater restrictions upon its content. First, because commercial speakers know the market and their product, they are uniquely positioned to assess the accuracy of their advertising claims and the lawfulness of their activity. Second, commercial speech springs solely from economic self-interest and is thus a resilient form of expression not vulnerable to being silenced by imprecise regulation. 447 U.S. at 564 n.6; *see also id.* at 571 n. 13 (commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply, and system of previewing advertising campaigns may be acceptable given adequate procedural safeguards); *Zauderer*, 471 U.S. at 668 (Brennan, J., concurring in part and dissenting in part) (a basic justification for allowing punishment for violations of imprecise commercial regulations is that businesspersons can clarify the meaning of

arguably vague regulations by consulting with governmental administrators).

For these reasons, the overbreadth doctrine has been found not to apply in the commercial speech context. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977) (although overbroad statutes may "chill protected speech," advertising is "linked to commercial well-being" and will therefore not be "crushed by overbroad regulation."). Of course, overbreadth is technically a standing doctrine which permits a party to challenge a law for impinging the First Amendment rights of others who are not before the court. Nonetheless, it is a close cousin to vagueness in that both doctrines recognize that imprecise statutes are of constitutional moment because they discourage people from exercising protected rights. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("overbroad laws, like vague ones, deter privileged activity . . . ."). *Bates* implies that although the vagueness doctrine may apply to commercial messages, a more relaxed inquiry may be appropriate.

In determining the vagueness standard for laws which do not reach any constitutionally protected conduct, the Court has explained:

> The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Village of Hoffman Est. v. *Flipside, Hoffman Est.*, 455 U.S. 489, 498 (1982) (footnotes omitted). Although the ordinance at issue in *Village of Hoffman*, unlike Section 17508.5, was a business licensing provision which implicated no commercial speech rights at all, the case does represent an implicit deter-

mination by the Supreme Court that in the commercial speech context, a statute need not rise to the level of precision required in noncommercial speech cases.

The relaxed vagueness test articulated in *Village of Hoffman*, although instructive, is not wholly controlling. The ordinance at issue in *Village of Hoffman* was punishable by fines of $10 to $500. Violation of Section 17508.5, on the other hand, is a misdemeanor punishable by imprisonment of up to six months and/or a fine not exceeding $1,000. Cal. Pen. Code § 19 (West 1988).[13] It goes without saying that the standard of certainty required in criminal statutes is more demanding than in noncriminal statutes because the consequences of imprecision are more onerous. *Village of Hoffman*, 455 U.S. at 498 (citing *Winters v. People of State of New York*, 333 U.S. 507, 515 (1948)). It would be unthinkable to incarcerate someone for violating a law which she could not possibly understand. *Barenblatt* v. *United States*, 360 U.S. 109, 137 (1959) (Black, J., dissenting).[14]

In light of all this, the court finds that in reviewing a commercial speech prohibition for facial vagueness which imposes criminal sanctions the question is whether the law affords fair notice to a business person of ordinary intelligence as to what conduct is illegal. The court now considers the challenged portions of section 17508.5.

The definition for "ozone friendly" is comprehensible on its face. The phrase "or any like term" is not ambiguous; it clearly refers to the modifying phrase "which connotes that stratospheric ozone is not being depleted." Cal. Bus. & Prof. Code § 17508.5(a). Section 17508.5(a) plainly brings within its scope only those advertising claims which suggest that the product does not deplete stratospheric ozone. The court is

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[13] California law provides other penalties for violations of section 17508.5, including civil injunction and civil fines not exceeding $2,500. *See* Cal. Bus. & Prof. Code §§ 17535 & 17536 (West 1991).

[14] In an attempt to skirt the criminal nature of section 17508.5, the state argues that according to "traditional office policy," violations of the statute are always filed civilly, not criminally. This will not do, for "well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964).

confident that manufacturers and distributors of ordinary intelligence know whether their product—through its use or production—releases any chemical or material into the environment which will "migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone." *Id.*[15]

The statute's definition of "recyclable" is more uncertain. The problem is that while section 17508.5(d) defines a consumer good as "recyclable" if it can be "conveniently recycled" in California counties with more than 300,000 people, the statute offers no guidance as to what recycling programs satisfy the "conveniently recycled" requirement. Section 17508.5(d) refers to section 40180 of the Public Resources Code which unambiguously defines "recycled."[16] However, an equally lucid explication of "conveniently" is wanting. Nor is there any legislative history extant to provide the court with guidance.[17]

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[15] Any uncertainty as to the "like terms" contemplated by section 17508.5(a) is settled by Federal Trade Commission Guidelines which explain that ozone-depleting materials include those substances listed as Class I and Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, or others subsequently designated by the Environmental Protection Agency as ozone-depleting substances. Class I chemicals are chlorofluorocarbons (CFCs), halons, carbon tetrachloride and 1.1.1-trichloroethane. Class II chemicals are hydrochlorofluorocarbons (HCFCs). *See* Def. Opp., Ex. A at 26-27.

[16] Section 40180 of the Public Resources Code provides:

> "Recycle" or "recycling" means the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw materials for new, reused, or reconstituted products which meet the quality standards necessary to be used in the market place.

Cal. Pub. Res. Code, § 40180 (West 1992).

[17] At oral argument the Deputy Attorney General muddied the waters further by suggesting that "conveniently" may refer both to the technological ease with which a container can be recycled and the access consumers must have to recycling centers which accept the materials in question. Moreover, the relevant state agency has not promulgated any regulations which define "conveniently recycled."

Does a manufacturer or distributor incur criminal penalties for labeling a product as "recyclable" if the recycling center which handles such products is located in a remote part of the county, or, if it is only open one day a month? This may be a fanciful example, but in light of the legislature's failure to define "conveniently," "[w]here does fanciful possibility end and intended coverage begin?" *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964). Did the legislature mean to establish a requirement that a substantial majority of consumers must have access to recycling programs that collect the material in question? Or can a product be labeled recyclable as long as at least one facility exists in the county to collect the relevant materials? That questions of this nature so readily come to mind means that it is not sufficiently clear to a manufacturer or distributor of ordinary intelligence, what exactly the statute prohibits. Due to the potential for criminal sanctions, including incarceration, the absence of any standard for "conveniently recycled" wrecks this portion of section 17508.5 on the shoals of vagueness. Although the legislature "needs leeway" to advance its goals in the commercial speech arena, *Fox*, 109 S. Ct. at 3035, in this instance the constitutional requirement of definiteness has not been met.

It is an elementary principle of statutory construction that "the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quoting *Allen* v. *Louisiana*, 103 U.S. 80, 83-84 (1881)). Under California law, the ability to sever an invalid portion of a statute depends on "whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute or constitutes a completely operative expression of the legislative intent and [is] not so connected with the rest of the statute as to be inseparable." *Metromedia, Inc. v. City of San Diego*, 32 Cal. 3d 180, 190 (1982) (citations omitted).[18]

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[18] This is essentially the same standard employed to determine the severability of federal statutes: "Unless it is evident that the legislature

There can be no dispute that the California Legislature would have passed AB 3994 had they known that the definition of "recyclable" was invalid. Furthermore, the remainder of section 17508.5 retains its effectiveness as a constitutionally permissible regulation on commercial speech. Accordingly, the court holds that subsection (d) of the statute is invalid, but leaves the remainder of section 17508.5 intact.

IV. CONCLUSION

The California legislature has responded to the "green marketing" phenomenon by mandating statutory definitions for commonly used environmental advertising claims. Plaintiffs have made this facial challenge on First Amendment and vagueness grounds. This court holds that section 17508.5 permissibly restricts plaintiffs' commercial speech and, except for subsection (d), the statute is not unconstitutionally vague on its face.

Accordingly, the court GRANTS partial summary judgment for plaintiff solely with respect to subsection (d) of section 17508.5 of the California Business and Professions Code which is stricken as unconstitutionally vague. In all other respects, plaintiffs' summary judgment motion is DENIED and the court, *sua sponte*, GRANTS partial summary judgment for defendant.

IT IS SO ORDERED.

Dated: December 23, 1992

ss/MARILYN HALL PATEL
MARILYN HALL PATEL
United States District Judge

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would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

APPENDIX

ENVIRONMENTAL REPRESENTATIONS RELATING TO CONSUMER GOODS

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resource Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or brought for use primarily for personal, family, or household purposes.

(g) For the purposes of this Section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

Cal. Bus. & Prof. Code § 17508.5 (West 1991).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15644

D.C. No. CV-92-00660-MHP
Northern District of California
Filed: February 23, 1995

ASSOCIATION OF NATIONAL ADVERTISERS, INC.; GROCERY MANUFACTURERS OF AMERICA, INC.; SOAP AND DETERGENT ASSOCIATION; NATIONAL FOOD PROCESSORS ASSOCIATION; THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; THE AMERICAN PAPER AND FOREST ASSOCIATION; THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE CALIFORNIA CHAMBER OF COMMERCE; and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs-Appellants

CALIFORNIANS AGAINST WASTE and
THE ENVIRONMENTAL DEFENSE FUND,

Intervenors-Appellees,

—v.—

DANIEL E. LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant-Appellee.

Before: CHOY and NOONAN, *Circuit Judges* and MARQUEZ, *District Judge.**

ORDER

A majority of the panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing is REJECTED.

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* The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations no actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

California Business and Professions Code

§ 17508.5 Environmental representations relating to consumer goods

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

§ 17500. False or misleading statements

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

§ 17508. Claims based on factual, objective or clinical evidence, comparisons with other brands or products, or based on fact

a. It shall be unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact.

b. Upon written request of the Director of Consumer Affairs, the Attorney General, any city attorney, or any district attorney any person doing business in California and in whose behalf advertising claims are made to consumers in California, including claims that (1) purport to be based on factual, objective, or clinical evidence, that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact, shall provide to the department or official making the request evidence of the facts on which such advertising claims are based. Any such request shall be made within one year of the last day on which such advertising claims were made.

Any city attorney or district attorney who makes a request pursuant to this subdivision shall give prior notice of such request to the Attorney General.

c. The Director of Consumer Affairs, Attorney General, any city attorney, or any district attorney may, upon failure of an advertiser to respond by adequately substantiating the claim within a reasonable time, or if such Director of Consumer Affairs, Attorney General, city attorney, or district attorney shall have reason to believe that any such advertising claim is false or misleading, do either or both of the following: (1) seek an immediate termination or modification of the claim by the person in accordance with Section 17535, (2) disseminate information, taking due care to protect legitimate trade secrets, concerning the veracity of such claims, or why such claims are misleading, to the consumers of this state.

d. The relief provided for in subdivision (c) is in addition to any other relief which may be sought for a violation of this chapter. Section 17534 shall not apply to violations of this section.

e. Nothing in this section shall be construed to hold any newspaper publisher or radio or television broadcaster liable for publishing or broadcasting any advertising claims referred to in subdivision (a), unless such publisher or broadcaster is the person making such claims.

f. The plaintiff shall have the burden of proof in establishing any violation of this section.

g. If an advertisement is in violation of subdivision (a) and Section 17500, the court shall not impose a separate civil penalty pursuant to Section 17536 for the violation of subdivision (a) and the violation of Section 17500 but shall impose a civil penalty for the violation of either subdivision (a) or Section 17500.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-920660 MHP

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., THE AMERICAN PAPER INSTITUTE, INC., THE AMERICAN ADVERTISING

FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs,

—v.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant.

PLAINTIFFS' AND DEFENDANT'S JOINT STIPULATION OF FACTS

Plaintiffs, The Association of National Advertisers, Inc., Grocery Manufacturers of America, Inc., The Soap and Detergent Association, National Food Processors Association, The Society of the Plastics Industry, Inc., The American Paper Institute, Inc., The American Advertising Federation, The American Association Of Advertising Agencies, The California Chamber of Commerce, and Chamber of Commerce of the United States and Defendant Daniel Lungren, sued herein in his official capacity as Attorney General of the State of California, enter into this Joint Stipulation of Facts intending to be bound thereby for the purpose of this litigation.

STIPULATED FACTS

THE PARTIES

1. Plaintiff The Association of National Advertisers, Inc. ("A.N.A.") is a non-profit trade association, organized under the laws of the State of New York. With more than 2,000 sub-

sidiaries, divisions and operating units, A.N.A. members market a variety of goods and services throughout the country. A central purpose of A.N.A. is to promote the common interests of businesses in advertising their products or services either regionally or nationally. Some A.N.A. members manufacture and/or distribute consumer products in California. Some A.N.A. members advertise and make statements to the public about their products in California.

2. Plaintiff Grocery Manufacturers of America, Inc. ("GMA") is a non-profit trade association of over 130 manufacturers of food and other consumer products, organized under the laws of the State of Delaware. Some GMA members manufacture and/or distribute their products in California. Some GMA members advertise and make statements to the public about their products in California. A central purpose of GMA is to advance the common interests of its members before governmental bodies and regulatory authorities. GMA has been active in presenting and advancing the views of its members on environmental issues.

3. Plaintiff The Soap and Detergent Association ("SDA") is a non-profit trade association organized under the laws of the State of Delaware. SDA is comprised of 143 companies engaged in the manufacture and distribution of soap and other cleaning products and the ingredients for those products. A principal purpose of the SDA is to advance the common interests of its member companies before federal and state legislatures, regulatory agencies and other governmental bodies. Some SDA members manufacture and/or distribute their products in California. Some SDA members advertise and make statements to the public about their products in California.

4. Plaintiff National Food Processors Association ("NFPA") is a non-profit trade association organized under the laws of the State of Delaware. The purpose of NFPA is to represent and advance the common interests of companies engaged in food processing and packaging on a wide variety of issues including environmental issues. NFPA is comprised of more

than 500 companies engaged in the manufacture and distribution of processed, packaged food products and food packaging and equipment. Some NFPA members manufacture and/or distribute their products in California. Some NFPA members advertise and make statements to the public about their products in California.

5. Plaintiff The Society of the Plastics Industry, Inc. ("SPI") is a national, not-for-profit trade association organized under the laws of the State of New York with more than 2,252 members representing all segments of the plastics industry in the United States. SPI members include resin manufacturers, distributors, machinery manufacturers, plastics processors and mold makers. Some SPI members manufacture and/or distribute consumer products and packaging for consumer products in California. Some SPI members advertise and make statements to the public about their products in California. One of the primary purposes of SPI is to represent its members in promoting plastics recycling throughout the United States.

6. Plaintiff The American Paper Institute, Inc. ("API") is a non-profit trade association organized under the laws of the State of Delaware. API's membership includes over 170 companies engaged in the business of manufacturing and distributing pulp, paper, paperboard and related products. Some API members manufacturer and/or distribute their products in California. The principal purpose of API is to promote the common goals of its member companies on a broad range of issues, specifically including environmental issues. Some API members advertise and make statements to the public about their products in California.

7. Plaintiff The American Advertising Federation ("AAF") is a national trade association organized under the laws of the District of Columbia. AAF members represent all elements of the advertising industry including companies that produce and advertise consumer products, advertising agencies, magazines and newspaper publishers, radio and television broadcasters,

outdoor advertising organization and other media. AAF members include twenty-one national trade associations, over two hundred local advertising clubs with 52,000 members, and over two hundred college chapters, with 6,000 student members. AAF's primary purpose is to respond to legislative and regulatory issues affecting the advertising industry at both the federal and state levels. AAF has been active in representing the common interests of the advertising industry before Congress, state legislatures and federal and state regulatory agencies. Some AAF members advertise and make statements to the public about their products in California.

8. Plaintiff The American Association of Advertising Agencies ("A.A.A.A.") is a national trade association organized under the laws of the State of New York. A.A.A.A.'s membership is comprised of over 730 advertising agencies doing business throughout the United States, including 77 agency companies with 201 offices in California. A.A.A.A. members create and place some 80 percent of all national advertising and substantial amounts of local and regional advertising in all 50 states including California. In addition, A.A.A.A. members provide a full range of marketing services to their clients including product promotion, public relations, direct marketing, merchandising, design and packaging services. A.A.A.A.'s purpose is to advance the common interests of the advertising industry and its has actively represented its members in connection with governmental efforts regarding the speech of its members.

9. Plaintiff The California Chamber of Commerce ("CCC") is a voluntary, non-profit California-wide association, with more than 3,800 members from virtually every industry and geographic section of the State. CCC is affiliated with and regularly communicates on current business issues with 387 local and regional chambers of commerce. A principal purpose of CCC is to advance the common interests of its members before the California Legislature, local governmental bodies and the courts on a broad range of issues affecting

business. Some CCC members manufacture and/or distribute various consumer goods in California. Some CCC members advertise and make statements to the public about their products in California.

10. Plaintiff Chamber of Commerce of the United States (the "Chamber") is a non-profit corporation organized and existing under the laws of the District of Columbia. As the nation's largest federal of businesses, the Chamber represents more than 180,000 businesses and business organizations throughout the United States, including over 20,000 in California. One of the Chamber's principal purposes is to represent the common interests of its members before the courts, Congress, the Executive branch, and the independent regulatory agencies of the federal government on issues of national concern to the business community. The Chamber's broad-based membership includes every industry represented by the other plaintiff-associations. Chamber members manufacture and/or distribute various consumer goods and packaging materials in California. Chamber members advertise and make statements to the public about their products in California.

11. Defendant Daniel Lungren is the Attorney General of the State of California. Under the provisions of the California Business and Professions Code, he is one party, among others, who may bring a civil or criminal action in his official capacity alleging violations of the provisions of Section 17508.5 of the California Business and Professions Code.

PLAINTIFFS' ACTIVITIES

12. Members of certain of the plaintiff-associations have been in the past distributed and continue to distribute a wide variety of consumer goods to retailers in the State of California and throughout the United States. Many of these products are used or consumed every day by consumers. Others of plaintiffs' members manufacture the packaging for such consumer products, including paper, plastic, glass and metal.

Some members of some of the plaintiff-associations make statements to the public about and engage in substantial advertisement of consumer goods, products and packaging, including their asserted environmental attributes.

13. During the past decade, there has been increasing public debate on the issue of solid waste disposal. Some members of some of the plaintiff-associations who manufacture and sell consumer products and use product packaging to protect and transport their products to the marketplace have made efforts to mitigate the possible effects of their products and packaging on the nation's solid waste stream. Some members of some of the plaintiff-associations have made statements to the public and have advertised to consumers what they claim are the environmental attributes of their products.

14. Some members of some of the plaintiff-associations, for example, have developed products in concentrated forms that require less product packaging. Others have introduced products in reusable containers. With respect to recycling, some members of the plaintiff-associations now use recycled paper or paperboard, plastic, metal and glass for packaging and others have worked to develop and implement improved recycling technology.*

15. With specific respect to plastics recycling, some members of the plaintiff-associations include recycled plastic in their plastic bottles. Some members of some of the plaintiff-associations have also devoted significant resources to the development and use of standardized plastic resin codes which now appear on most plastic bottles. These codes make it easier to sort plastics for recycling. In addition, some of plaintiffs' members participate in arrangements that provide an assured market for recycled plastic packaging for certain

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* Except where specifically indicated, when used in the text of this Stipulation, the words "ozone friendly," "biodegradable," "photodegradable," "recyclable," "recycled" and "consumer good" are not used as defined in Section 17508.5 of the California Business and Professions Code. When used as so defined, they are enclosed in quotation marks.

types of plastic resin. Some of these companies have been working with state and local governments, consumer groups and others to increase the amount of plastic diverted from the solid waste stream through community recycling programs.

16. For example, as part of its efforts to encourage plastics recycling, the SPI—through its program The Council for Solid Waste Solutions—has published a national advertisement entitled "The Urgent Need to Recycle." A true and correct copy of the advertisement is submitted herewith as Exhibit 1.

17. Educating consumers about the environmental attributes of consumer products and packaging is one component in encouraging recycling. Recycling can be encouraged through product labeling and advertising. Some companies, including some member of some of the plaintiff-associations, have provided consumers with information that indicates whether product packaging is made from recycled materials and whether product packaging itself is capable of being recycled.

18. One member of a number of the plaintiff-associations now labels its plastic packages with the legend "Support Plastic Recycling." The following statement appears on the reverse side of the package:

> Please help! We are now using technology that can include recycled plastic in our bottles at levels between 25% and 35%. But to do so consistently, we need more recycled plastic. So please encourage recycling in your community.

A true and correct copy of the label is submitted herewith as Exhibit 2. This label was referred to in a report entitled "The Green Report II: Recommendations for Responsible Environmental Advertising" ("Green Report II"). Green Report II was published by an 11-state ad hoc Task Force of State Attorneys General, of which Attorney General Lungren was

a member. A true and correct copy of Green Report II is submitted herewith as Exhibit 3.

19. Submitted herewith as Exhibit 4 is a copy of part of a box label from Kellogg's Crispix which states on its front: "Carton Made From 100% Recycled Paper; Minimum 35% Post-Consumer Content." Submitted herewith as Exhibit 5 is a copy of part of a box of Kellogg's Rice Krispies which on its front states: "Carton Made From 100% Recycled Paper; Minimum 35% Post-Consumer Content." Submitted herewith as Exhibit 6 is a copy of part of a box label from General Mills' Cheerios which on its top states: "Carton Made From 100% Recycled Paperboard; Minimum 35% Post-Consumer Content." Submitted herewith as Exhibit 7 is a copy of a paper grocery sack manufactured by Trojan Kraft Bags, which on the bottom states: "32% Recycled Product From Post-Consumer Paper Fibers." Submitted herewith as Exhibit 8 is a copy of a plastic Quikmate grocery sack used by Lucky Supermarkets and manufactured by Sunoco which states: "Recycling at Lucky has come full circle. This bag contains at least 10% recycled material." Some of these companies are members of some of the plaintiff-associations.

20. Some members of some of the plaintiff-associations have claimed on product labels that packaging is made from recycled material or contains recycled material, that the product is recyclable or that the product is "coded" for recycling, referring to the plastic resin codes appearing at the bottoms of many plastic containers.

21. Some members of some of the plaintiff-associations also make representations on product labels and in advertisements about the claimed environmental attributes of the products themselves such as their biodegradability. Many products are used in or with water and are disposed of through community waste water systems. A number of manufacturers have in the past included statements on product packaging relating to the environmental effect of their products on the nation's water resources.

22. In addition to information contained on product labels, some members of some of the plaintiff-associations identify an 800 telephone number on product packaging, advising consumers that they may call at no charge to ask questions or obtain additional information about the products.

23. The terms defined by Section 17508.5 had been used in varied fashion by different advertisers when they made statements about the claimed environmental benefits of their packaging and/or products to the public in California. Proponents of the legislation urged upon the legislature that the terms themselves had no common and ordinarily accepted meaning and that although some of the terms had at some times been used in an appropriate manner, other times they had been used in either a misleading or deceptive manner.

THE STATUTE AT ISSUE

24. In 1990, the California Legislature enacted AB 3994, a bill which, *inter alia*, added Section 17508.5 to the California Business and Professions Code. California Business and Professions Code Section 17508.5 currently provides:

> 17508.5 It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:
>
> (a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resource Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or bought for use primarily for personal, family or household purposes.

(g) For the purposes of this Section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

25. The penalties for a violation of Section 17508.5 are set forth in California Penal Code Section 19 and California Business and Professions Code Sections 17534, 17535 and 17536.

26. The Federal Trade Commission ("FTC") has not adopted trade rules defining any of the terms addressed in Section 17508.5.

27. Some members of some of the plaintiff-associations have used in the past and wish to continue to use the terms ozone friendly, biodegradable, photodegradable, recyclable, and recycled in both non-commercial and commercial contexts. Some members of some of the plaintiff-associations have used in the past and wish to continue to use those terms in communicating with the public about environmental policies and the environmental attributes of consumer products in California.

28. On December 11, 1990, plaintiff The American Paper Institute, Inc., through its vice president, Robert T. McKernan, presented testimony to the ad hoc State Attorneys General Task Force dealing with the issue of environmental advertising and "The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising" ("Green Report I"). A copy of API's written presentation is submitted herewith as Exhibit 9. A copy of Green Report I is submitted herewith as Exhibit 10.

29. On March 14 and 15, 1990, the ad hoc Task Force of State Attorneys General concerned with deceptive environmental advertising held a first series of public hearings in St. Paul, Minnesota. Some members of some of the plaintiff-associations presented written and oral testimony at these hearings. For example, The Procter & Gamble Company submitted a letter, dated March 12, 1990, a copy of which is submitted herewith as Exhibit 11. Another member of some of the plaintiff-associations, The Dow Chemical Company, through Karl W. Kamena, Director, Government Affairs & Public Issues, also presented oral and written testimony at these hearings. A copy of a transcript of his oral testimony and a one-page written submission is submitted herewith as Exhibit 12.

30. Some members of some of the plaintiff-associations wish to make statements in advertising and on consumer packaging such as the following:

> a) "recyclable where facilities are available", even though the product or package cannot be "conveniently recycled" in every county in California with a population of over 300,000 persons;
>
> b) "package made from recycled industrial waste materials" or "package contains five percent recycled postconsumer waste material";
>
> c) that products are "biodegradable" or "photodegradable," even though that process may not occur within a one-year period.

31. The Kellogg Company, a member of some of the plaintiff-associations, has made the following statement on the top inside box panel of its Rice Krispies and Crispix products:

> Did you know that if Americans recycled all of our Sunday newspapers, we could save over 500,000 trees each week or 26,000,000 every year?
>
> Recycling plays a key role in protecting our environment and conserving natural resources. Kellogg Company encourages support of recycling efforts in your community.

Copies of the box labels are submitted herewith as Exhibits 4 and 5.

32. On February 14, 1991, plaintiff NFPA, joined by plaintiffs A.A.A.A., A.N.A., and GMA, filed a petition with the Federal Trade Commission calling for the adoption of federal guides relating to environmental advertising. A true and correct copy of the "Petition for Industry Guides for Environmental Claims Under Section 5 of the Federal Trade Commission Act" is submitted herewith as Exhibit 13. Plaintiff API, through its president, Red Cavaney, testified on July 18,

1991 before the Federal Trade Commission at hearings held to consider the petitions it had received regarding adoption of federal guides relating to environmental advertising. A true copy of the testimony of American Paper Institute, Inc. presented by Red Cavaney, President, to the Federal Trade Commission in July, 1991, is submitted herewith as Exhibit 14. A true copy of the "Testimony of the Society of the Plastics Industries, Inc. Before the Federal Trade Commission Regarding Environmental Marketing and Advertising Claims" is submitted herewith as Exhibit 15.

33. As a result of the adoption of Section 17508.5, members of the plaintiff-associations are concerned that, unless they use the words defined in the statute in the way they are defined in the statute, continued publication of their labels and advertisements in California will subject them to potential civil or criminal liability.

34. Following the adoption of Section 17508.5, Fisher Nut Company, a subsidiary of one member of a number of the plaintiff-associations, has chosen to eliminate environmental messages from its labels entirely. For example, before the passage of Section 17508.5, Fisher Nut Company placed the following legend on its package for a mixed nuts product:

> The body of this can is steel. This material is recyclable where steel recycling facilities exist. Support recycling in your community.

A true and correct copy of the label is submitted herewith as Exhibit 16. Fisher Nut Company determined that because of the passage of Section 17508.5 it should remove and removed that legend from the product label. The new label contains no reference to recyclability or recycling at all. A true and correct copy of the new label is submitted herewith as Exhibit 17.

35. Fisher Nut Company was not told by defendant or any other law enforcement official that its label violated Sec-

tion 17508.5 or that a civil or criminal prosecution would be commenced against it if the label was continued.

36. Another member of several of the plaintiff-associations, Del Monte Foods Company, determined that because of the adoption of Section 17508.5, it will not again publish in California two advertisements it previously published in magazines distributed throughout California. The first of these advertisements stated, under the heading "PRECIOUS METAL" and a picture of an ordinary steel can:

> The "tin" can may just be the world's perfect container. It's made of durable, high grade steel that is completely recyclable.* It saves energy because it requires no refrigeration. And the can is made, shipped and stored more economically than other packages. So the dollars you spend go more to the food you eat than the package that contains it. The steel can. Precious little could be done to improve it.

The advertisement concluded with the phrase "Food for Thought" followed by the Del Monte name and symbol. Under that in smaller print the footnoted material advised:

> Del Monte supports steel can recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 600 Anderson Drive, Pittsburgh, PA 15220.

A true and correct copy of the advertisement is submitted herewith as Exhibit 18. The second of these advertisements stated, under the heading "RECYCLING TIME" and a picture of a watch lying on a flattened steel can:

> This watch is a piece of junk. Its metal bearings are made entirely from recycled cans. In fact, the everyday "tin" can is made of 100% recyclable high grade steel. And if we all recycle, cans will provide the best means to build our bridges, skyscrapers, automobiles—even precision watches. The time to recycle is now.

The advertisement concluded with the phrase "FOOD FOR THOUGHT" followed by the Del Monte name and symbol. The footnoted material was identical to that set forth above. A true and correct copy of the advertisement is submitted herewith as Exhibit 19. The two advertisements triggered numerous requests from consumers in California to the Steel Can Recycling Institute about steel can recycling.

37. Del Monte Foods Company was not told by defendant or any other law enforcement official that either such advertisement violated Section 17508.5 or that a civil or criminal prosecution would be commenced against it if the advertisements were to continue.

PRIOR EXISTING LAW

38. Advertising and/or marketing claims that are "untrue or misleading" are prohibited in California under Section 17500 of the California Business and Professions Code. California law enforcement officials have relied on Section 17500 to prosecute allegations of false or misleading advertising in connection with environmental attributes.

39. For example, in June 1990, the Attorney General of the State of California brought an action against Mobil Chemical Company ("Mobil") under Section 17500 alleging that Mobil's environmental marketing claims in advertisements and labels stating that Hefty brand plastic garbage bags were "degradable" were untrue and misleading. The Attorney General sought an injunction and civil penalties. In June 1991 the Attorney General and Mobil entered into a stipulated settlement order under which Mobil, without admitting any liability or wrongdoing, agreed to stop using the "degradable" claim on Hefty bag labels and paid $25,000 to the State of California.

40. The Attorney General has also entered into stipulated agreements with other firms regarding the use by these firms of alleged untrue or misleading representations regarding the environmental attributes or waste disposal options for their

products or packaging. The California Attorney General based his involvement in these actions on alleged violations of Business and Professions Code Section 17500. These matters involved challenges to product and packaging claims of biodegradability, degradability, photodegradability, ozone safety, recyclability, compostability, ability to extend landfill life and general, but unspecified, environmental benefit.

41. In stipulating to enter into these agreements, none of the companies admitted that its advertisements were misleading and because these agreements were stipulated to, there are no court findings that these advertisements were misleading.

42. Section 17508 of the California Business and Professions Code was also in existence prior to the adoption of Section 17508.5 of the California Business and Professions Code.

43. The legislature has a substantial interest in prohibiting the use of untrue or misleading advertising, including advertising relating to the claimed environmental attributes of products and/or packaging.

44. Some local governments in California have spent millions of dollars creating curbside and other recycling programs. These programs have met with enormous consumer cooperation; post-consumer waste is being collected at rates beyond those originally projected for these programs and at a rate beyond that which recycling collectors can successfully market. Collectors have complained there is no market in California for the post-consumer resources they collect for recycling and frequently threaten to burn or landfill the resources they collect for recycling.

45. Steel cans are redeemable in a majority of counties in California. Some steel recycling plants exist in California in counties with populations in excess of 300,000; they do not exist in others.

46. There are seven plastic resin types commonly found in household packaging: polyethylene terephthalate ("PET") (primarily used in soft drink bottles), low density polyethelene ("LDPE"), high density polyethelene ("HDPE") (used in milk, water, juice and beverage bottles, bleach and detergent bottles), polyvinyl chloride ("PVC"), polypropylene (PP), polystyrene and other commingled plastics. Of those, two (2) types—PET and HDPE—are redeemable at most collection centers in California. In California, those who collect these two (2) types of plastic post-consumer waste and those recyclers who use them cannot get enough of these resources because large remanufacturing markets exist for the use of all collected post-consumer waste of this type. California law requires that all rigid plastic bottles and rigid plastic containers sold in California be labeled with a code which indicates which of the seven resin types identified above was used to produce the bottle or container. California Public Resources Code Section 18015.

47. Industrial waste (sometimes referred to as "mill scrap") has been recycled by some members of industry for years.

48. California consumers support local recycling programs and buy products based on their asserted environmental attributes. California consumers are likely to believe that generalized environmental claims made on packages in California are relevant in California.

49. During the years prior to the passage of Section 17508.5, there had been an increase in the amount of environmental product advertising disseminated before the public in California.

LEGISLATIVE HISTORY

50. AB 3994, the bill which added Section 17508.5 to the California Business and Professions Code, was sponsored by the Sierra Club and authored by Assembly Member Byron

D. Sher, Chairman of the Assembly Natural Resources Committee.

51. A true and correct copy of the Bill Digest on AB 3994, dated May 3, 1990, prepared for the Senate Committee on Business and Professions is submitted herewith as Exhibit 20. A true and correct copy of the Bill Digest on SB 1741, dated June 11, 1990, prepared for the Senate Committee on Business and Professions is submitted herewith as Exhibit 21. A true and correct copy of a memorandum, dated June 18, 1994, from Michael E. Kelly, Director of the Department of Consumer Affairs to the Senate Business and Professions Committee on AB 3994 is submitted herewith as Exhibit 22. A true and correct copy of the Bill Analysis prepared by the Department of Finance regarding AB 3994, dated May 24, 1990, is submitted herewith as Exhibit 23. A true and correct copy of the Enrolled Bill Report on AB 3994, dated August 27, 1990, submitted to the Governor by the Department of Consumer Affairs is submitted herewith as Exhibit 24. A true and correct copy of the Attorney General's letter to the Governor concerning AB 3994, dated September 10, 1990, is submitted herewith as Exhibit 25.

52. After AB 3994 was passed by the legislature, it was presented to Governor Deukmejian for signature. On signing the bill, Governor Deukmejian issued an approval message which stated:

> I have signed this date Assembly Bill No. 3994. This bill would make it unlawful for manufacturers and distributors to represent that their products are "ozone friendly", "biodegradable", "photodegradable", "recycled" unless the products meet specified standards. The bill also requires parties who make general environmental claims about their products (e.g., "environmentally friendly", "eco-friendly", or a "green product") to maintain records which substantiate the claim, and which are available to the public upon request. Violations

would be misdemeanors punishable by imprisonment in the county jail, fine, or both.

I am concerned that this bill makes no allowance for goods already in the stream of commerce which were manufactured and packaged before the effective date of this bill. Manufacturers and distributors would have to recall these products or run the risk of criminal prosecution if the product label did not meet the definition of the bill. This bill violates constitutional principles against retroactive application of criminal statutes.

I am also concerned with the definition of "recyclable" which is defined as meaning the articles can be conveniently recycled in every county in California with a population over 300,000. This term is impermissibly vague to be the basis of a criminal statute because it does not clearly state what is necessary to meet the test of convenience. Other definitions in the bill are too vague or overly strict.

Without specific definitions, manufacturers may be chilled from providing any labels, even when the packaging is more environmentally friendly than other packaging. This would be contrary to the goal that we all share to encourage packaging that is recyclable or environmentally sound.

The author has agreed to address these concerns with cleanup legislation next year. With this understanding, I approve this bill.

53. By letter dated September 24, 1990, Assemblyman Member Sher, the author of AB 3994, wrote to Governor Deukmejian concerning the bill. A true and correct copy of the letter is submitted herewith as Exhibit 26.

54. Shortly after Section 17508.5 became effective, Committee Chairman Sher, wrote to Attorney General Lungren, by letter dated January 10, 1991, requesting that the Attorney

General's office postpone enforcement of the law until such time as the California Legislature had the opportunity to clarify its provisions. A true and correct copy of the letter is submitted herewith as Exhibit 27. By letter dated January 14, 1991, Committee Chairman Sher wrote to Attorney General Lungren clarifying his letter of January 10, 1991. A true and correct copy of the letter is submitted herewith as Exhibit 28.

55. By letter dated October 18, 1991, Committee Chairman Sher advised Attorney General Lungren that a bill to amend Section 17508.5 (A.B. 144) had failed to pass the Legislature. Some of the plaintiff-associations opposed passage of certain versions of A.B. 144. In his letter of October 8, 1991, Chairman Sher also formally withdrew his request that the Attorney General and local prosecutors postpone enforcement actions under the statute and urged them to begin immediate enforcement of the law. A true and correct copy of the letter is submitted herewith as Exhibit 29. The Attorney General responded to Assemblyman Sher by letter dated October 30, 1991. A true and correct copy of the letter is submitted herewith as Exhibit 30.

56. To date, no law has been enacted to amend the provisions of Section 17508.5.

57. Attorney General Lungren has not brought any actions alleging a violation of Business and Professions Code Section 17508.5, nor has he told the plaintiffs or any member of any plaintiff association that he intends to bring such an action.

58. Recycling programs exist in various places in California for various types of materials, some of which are run by governmental authorities and some by private parties. These programs range from curb-side pickup to dropoff at collection centers, which may be located at varying distances from the consumer. Some programs require the consumer to presort the materials for recycling while others do not.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-920660 MHP
Date: 9/18/92, Time: 10:30 AM
Dept: 5 (Judge Patel)

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., THE AMERICAN PAPER INSTITUTE, INC., THE AMERICAN ADVERTISING

FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE CALIFORNIA CHAMBER OF COMMERCE; and CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs,

—v.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant

CALIFORNIANS AGAINST WASTE and ENVIRONMENTAL DEFENSE FUND

Defendant-Intervenors

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * *

[33] about what these terms mean are endless. The legislature was within its legal prerogative to define them.

Further, unlike the regulations in *Lever Brothers Co. v. Maurer*, 712 F. Supp. 645 (S.D. Ohio 1989) and *Anderson, Clayton & Co. v. Washington State Department of Agriculture*, 402 F. Supp. 1253 (W.D. Wash. 1975), which prohibited the use of the term butter even when the term was conditioned by other language, the legislature in adopting Section 17508.5 did *not* prohibit the use of the defined terms when used in conjunction with other terms which explain how the defined term is being used differently than defined in the statute. Certainly if the legislature had wished to prohibit the use of these terms, it knew how to accomplish this task. Not only did it not do that, it also did not prohibit the use of these words in combination with other explanatory words.

Defendant respectfully suggests the correct way to interpret Section 17508.5 is as follows: the legislature only meant to define the words of the section when they are used in isolation, because then, without an agreed upon definition, they carry a great potential to be misleading; further the definition has no application when the words are used in conjunction with modifiers which adequately dispel deception. Such an approach to statutory interpretation was recently approved of by the California Supreme Court in another First Amendment challenge to a statute. *See*, *Moore v. California State Board of Accountancy*, California Supreme Court No. S017399, 92 Daily Journal D.A.R. 9506 (July 2, 1992). There the Court held that a regulatory * * *

[43] two prongs of *Central Hudson*.

In doing so, it must be remembered that in effect, both of these tests "require a balance between the governmental interest an the magnitude of the speech restriction." *San Francisco Arts & Athletes, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537, n. 16 (1987).

(1) Section 17508.5 Directly Advances the Governmental Interest in Preventing Deceptive Environmental Advertising

Section 17508.5's requirement that, when used by manufacturers and distributors of consumer goods, the words "ozone friendly," "photodegradable," "biodegradable," "recyclable," and "recycled" meet the statutory definition when used in advertisements and on labels without explanation results in reduced deceptive "environmental attribute" advertising. Of course, as pointed out above, if manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms, then

---

methods to save landfill space; (f) preserving virgin resources; and (g) preventing unfair competition which would result when (1) products which possess environmental benefits because manufacturers of such products spent the resources necessary to develop products which are more environmentally benign, (2) must compete with products which do not possess similar environmental benefits but advertise such benefits nonetheless.

California further has a substantial interest in protecting the public from claims which have the capacity to mislead members of the public about the state of recycling in California. If advertisers make claims about the recyclability of given products or packaging when such cannot be recycled in California, consumers not only may be mislead, but may become frustrated and then disregard accurate statements made regarding recyclability. California has an interest in protecting consumers from this frustration which could ultimately injure truthful recycling efforts.

[44] Section 17508.5 has no application.

Consumers usually are unable to determine for themselves the validity of an environmental claim made for consumer goods. They must rely on the truthfulness of the advertiser for the validity of the claim. Where, as in the market situation which pre-dated the adoption of Section 17508.5, (*See*, *supra*, pages 2-5) there was much confusion and uncertainty over what different advertisers meant when they used the same terms, it was only proper for the legislature to bring a level playing field to all advertisers. By requiring that all advertisers mean the same thing when using the terms set forth in Section 17508.5 without explanation, the legislature both: (1) ensured "that the stream of commercial information flows cleanly as well as freely," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 748, 771-772 (1976), so that consumers could rely on the truthfulness of the claims made; and, (2) encouraged those advertisers who wished to make truthful and meaningful environmental product claims, but were uncertain as to the standards, to make such claims.

As the state had shown that the use by optometrists of optometrical trade names was deceptive in *Friedman v. Rogers*, 440 U.S. 1, 13, (1979), and thus could be banned, so too, here the use of environmental terms which have no common meaning to sell products can cause confusion and deception. Yet the legislature did not ban their use, it merely said that when used without definition by the advertiser, these terms mean the following: "(a) 'ozone friendly . . . means . . . , etc." This statute * * *

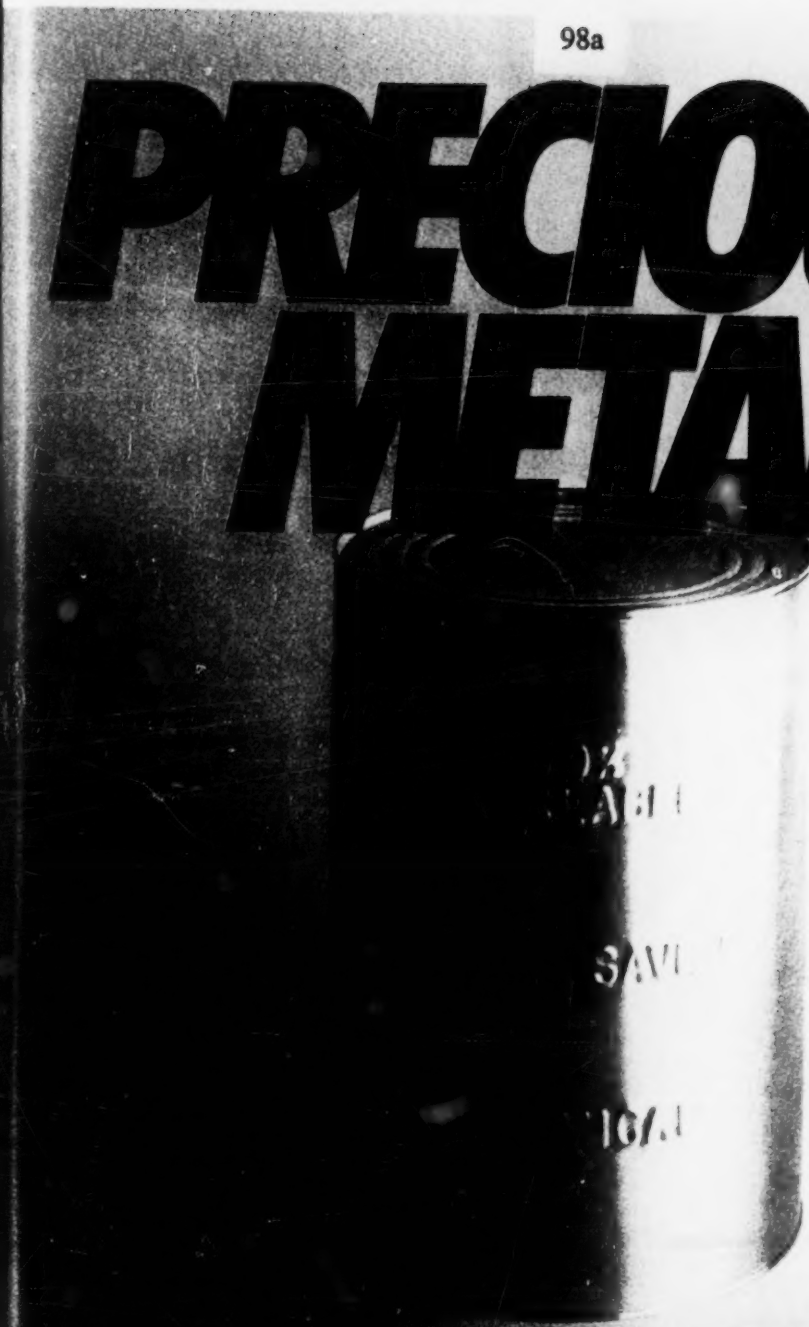
[47] meets the " 'fit' between the legislature's ends and the means chosen to accomplish those ends" as required by the Court in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986) and *Fox, supra*, 492 U.S. at 480.

Thus, manufacturers and distributors are free to advertise the claimed environmental attributes of their products so long as they fully explain what the words they use mean in relation to the claim for that product. Section 17508.5 will thus have a similar effect to that the Court found the regulation in *Friedman v. Rogers*, 440 U.S. 1 (1979) to have. In upholding the ban on optometrists being able to advertise under trade names, the Court said the ban would, "rather than stifling commercial speech, ensure that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with trade names." *Id.*, at 16.

Likewise, Section 17508.5 merely conditions the use of terms which had been used in an ambiguous fashion so that they are now less likely to be used in a deceptive manner. It tells advertisers to either use the terms as defined or tell the public how the term is being used in the advertisements.

Plaintiffs seek to have this Court "second guess" the judgment of the California Legislature regarding the most effective means of curtailing deception in the environmental marketing arena. Plaintiffs imply that because Business and Professions Code Sections 17500 and 17508 existed at the time * * *

PRECIOUS METAL



...container just be the world's perfect container. It's made of durable, high-... steel that is completely recyclable.* It saves energy because it requires no ... production. And the can is made, shipped and stored more economically than other packages. ... dollars you spend go more to the food you eat than the package that contains it. ... steel can. Precious little could be done to improve it.

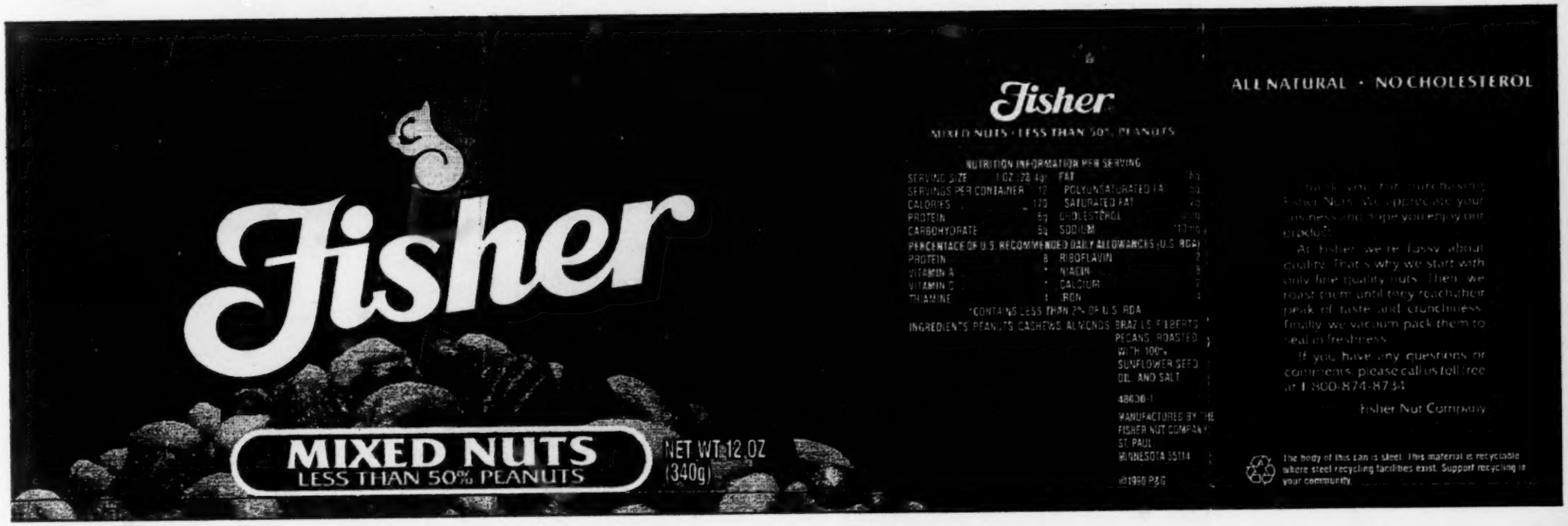
FOOD FOR THOUGHT Del Monte Quality

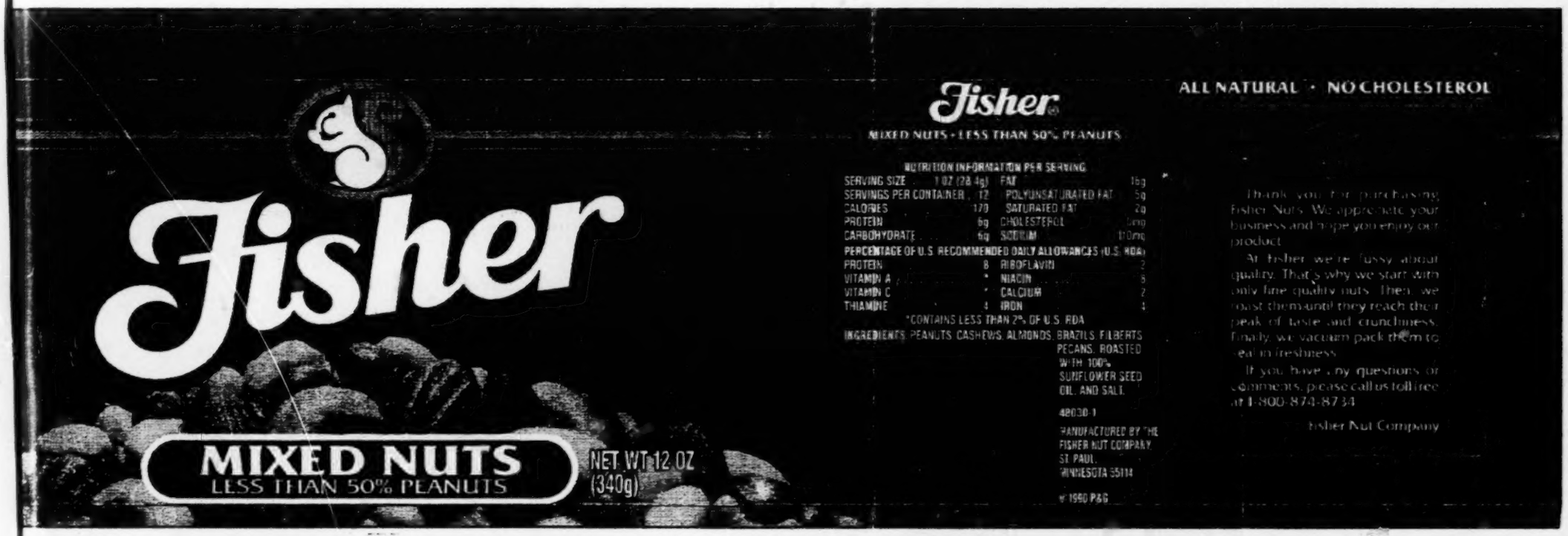
*...recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 680 Anderson Drive, Pittsburgh, PA 15220.

RECYCLING TIME

This watch is a piece of [illegible]
In fact, the everyday "tin" can [illegible]
will provide the best means to [illegible]
watches. The time to recycle is [illegible]

Del Monte Quality


Fisher
MIXED NUTS
LESS THAN 50% PEANUTS
NET WT 12 OZ
(340g)
Fisher
MIXED NUTS • LESS THAN 50% PEANUTS
NUTRITION INFORMATION PER SERVING
SERVING SIZE 1 OZ (28.4g)
SERVINGS PER CONTAINER 12
CALORIES 170
PROTEIN 6g
CARBOHYDRATE 6g
FAT 8g
POLYUNSATURATED FA 3g
SATURATED FAT 2g
CHOLESTEROL 0mg
SODIUM 110mg
PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)
PROTEIN 8
VITAMIN A *
VITAMIN C *
THIAMINE 4
RIBOFLAVIN 2
NIACIN 8
CALCIUM 2
IRON 4
*CONTAINS LESS THAN 2% OF U.S. RDA
INGREDIENTS: PEANUTS, CASHEWS, ALMONDS, BRAZIL FILBERTS, PECANS, ROASTED WITH 100% SUNFLOWER SEED OIL, AND SALT
48630-1
MANUFACTURED BY THE FISHER NUT COMPANY ST. PAUL MINNESOTA 55114
©1990 P&G
ALL NATURAL • NO CHOLESTEROL
Thank you for purchasing Fisher Nuts. We appreciate your business and hope you enjoy our product.
At Fisher, we're fussy about quality. That's why we start with only fine quality nuts. Then we roast them until they reach their peak of taste and crunchiness. Finally, we vacuum pack them to seal in freshness.
If you have any questions or comments, please call us toll free at 1-800-874-8734.
Fisher Nut Company
The body of this can is steel. This material is recyclable where steel recycling facilities exist. Support recycling in your community.


Fisher
MIXED NUTS
LESS THAN 50% PEANUTS
NET WT 12 OZ
(340g)
Fisher
MIXED NUTS • LESS THAN 50% PEANUTS
NUTRITION INFORMATION PER SERVING
SERVING SIZE 1 OZ (28.4g)
SERVINGS PER CONTAINER 12
CALORIES 170
PROTEIN 6g
CARBOHYDRATE 6g
FAT 15g
POLYUNSATURATED FAT 5g
SATURATED FAT 2g
CHOLESTEROL 0mg
SODIUM 170mg
PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)
PROTEIN 8
VITAMIN A *
VITAMIN C *
THIAMINE 4
RIBOFLAVIN 2
NIACIN 6
CALCIUM 2
IRON 4
*CONTAINS LESS THAN 2% OF U.S. RDA
INGREDIENTS: PEANUTS, CASHEWS, ALMONDS, BRAZILS, FILBERTS, PECANS, ROASTED WITH 100% SUNFLOWER SEED OIL, AND SALT.
42030-1
MANUFACTURED BY THE FISHER NUT COMPANY ST. PAUL, MINNESOTA 55114
© 1990 P&G
ALL NATURAL • NO CHOLESTEROL
Thank you for purchasing Fisher Nuts. We appreciate your business and hope you enjoy our product.
At Fisher, we're fussy about quality. That's why we start with only fine quality nuts. Then, we roast them until they reach their peak of taste and crunchiness. Finally, we vacuum pack them to seal in freshness.
If you have any questions or comments, please call us toll free at 1-800-874-8734.
Fisher Nut Company